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APPLICABILITY OF THE LAST CLEAR CHANCE DOCTRINE
IN MISSISSIPPI

James E. Price

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PUBLIC EMPLOYEES RETIREMENT SYSTEM OF MISSISSIPPI—
A BALANCED SYSTEM

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May, 1958

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CONTENTS

LEADING ARTICLES

- APPLICABILITY OF THE LAST CHANCE DOCTRINE
IN MISSISSIPPI James E. Price 247
- COMPETENCY OF A DEFENDANT TO TESTIFY WHEN SUED
UNDER THE WRONGFUL DEATH STATUTE....Curtis E. Coker 258
- CRIMINAL CONVICTIONS AS EVIDENCE IN CIVIL
PROCEEDINGS Millard M. Bush, Jr. 276
- PUBLIC EMPLOYEES RETIREMENT SYSTEM OF MISSIS-
SIPPI — A BALANCED SYSTEM Lester C. Franklin, Jr. 286

STUDENT COMMENTS

- STATE FINANCIAL AID FOR MUNICIPALITIES 298
- TERRITORIAL JURISDICTION 320

RECENT DECISIONS

- Administrative Law—Reparations Under the Natural Gas Act..... 331
- Constitutional Law—Conviction of Offense of Greater Degree
on Reversal as Double Jeopardy 333
- Constitutional Law—Racial Discrimination by Labor Union
As "State Action" 335
- Constitutional Law—Conviction Without Knowledge of Criminal
Statute—Unconstitutional Denial of Due Process..... 338
- Constitutional Law—Right of Each State to Prescribe the
Procedure to Raise a Constitutional Issue..... 340
- Federal Tax Liens—Effect of Non-Judicial Sale Under a
Prior Recorded Deed of Trust—To Extinguish..... 342
- Malicious Prosecution—What Constitutes Termination..... 345
- Mississippi Constitutional Law—Delegation of Power—
Sufficiency of The Standard 348
- Oil and Gas—Implied Covenant of Future Development—
Prudent Operator Rule 351
- Title By Estoppel—Quitclaim Deeds—Exception to
Statutory Rule in Mississippi 353
- Torts—Attractive Nuisance Doctrine—Liability for
Drowning of Trespassing Child 355

RECENT BOOKS

- Legal Medicine Joe R. Fancher, Jr. 359
- The Joint Venture and Tax Classification.....Robert J. Hobby 360
- Desegregation and The Law: The Meaning and Effect
of the Segregation Cases William P. Murphy 361

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APPLICABILITY OF THE LAST CLEAR CHANCE DOCTRINE IN MISSISSIPPI

James E. Price*

I. INTRODUCTION

Prior to the adoption in Mississippi of the comparative negligence statute,¹ the last clear chance doctrine was firmly embedded in the jurisprudence of this jurisdiction. While it had been hinted at in earlier cases,² the doctrine was considered at length and specifically approved and adopted by our Supreme Court in *Fuller v. Illinois Central Railroad Co.*,³ a case decided after the adoption of our comparative negligence statute but upon a factual situation occurring before such statute became effective.

After the decision in the *Fuller* case, the doctrine lay dormant in Mississippi until it was revitalized and used as the basis for the decision by the United States Court of Appeals for the Fifth Circuit in the case of *Underwood v. Illinois Central Railroad Co.*⁴ This decision reversed the judgment of the District Court of the Southern District of Mississippi in favor of the defendant railroad company, which judgment had been entered on a directed verdict. Upon remand the case was tried again, with the jury being unable to agree upon a verdict. The third trial in the District Court resulted in a jury verdict for the two plaintiffs; and on appeal, the Court of Appeals reversed itself completely and held that the defendant railroad company was entitled to a peremptory instruction, whereupon they again reversed the judgment of the District Court.⁵

The Court of Appeals justified its seemingly contradictory results upon a difference in the evidence introduced in the two cases. The important point for our purposes is that each appellate decision recognized the availability of the last clear chance doctrine in Mississippi,

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¹Miss. Code Ann. § 1454 (1942).

²*Christian v. Illinois Cent. R. Co.*, 12 So. 710 (Miss. 1893); *Southern Ry. Co. v. Floyd*, 99 Miss. 519, 55 So. 287 (1911).

³100 Miss. 705, 56 So. 783 (1911).

⁴205 F.2d 61 (5th Cir. 1953).

⁵*Illinois Cent. R. Co. v. Underwood*, 235 F.2d 868 (5th Cir. 1956).

provided the necessary elements required for its application were present. The basic legal doctrine underlying the decision in each case was, therefore, the same, although its application to the different factual situations as disclosed by the evidence necessitated completely opposite results.

In view of these two recent federal court decisions involving the application of Mississippi law, the last clear chance doctrine has ceased to be merely an interesting academic or theoretical exercise in mental gymnastics for the legal scholar, and has become an important practical consideration for the trial lawyer practicing in this jurisdiction. For if the doctrine does still prevail in Mississippi, it will serve as a restriction or limitation upon our comparative negligence doctrine to an extent not heretofore recognized.

It is, therefore, the purpose of this article to examine the fundamental tenets of the doctrine and the decisions of our Supreme Court to determine whether there is a logical basis to assert that the doctrine could prevail in Mississippi in spite of, or in addition to, our comparative negligence doctrine. Of course, only a specific decision by the Mississippi Supreme Court can give an authoritative and categorical answer to the question as posed. This article is not intended to be an exhaustive study of the application of the doctrine to specific factual situations; the primary question involved here is whether the doctrine can be invoked under any circumstances in this jurisdiction, not how it would apply to a particular case. No attempt will be made to discuss the apparently divergent views in various jurisdictions concerning the practical scope and application of the doctrine, except such as may be necessary for a full understanding of its legal basis.⁶

II. DEFINITION OF DOCTRINE

Perhaps the broadest definition of the doctrine is that found in 38 *American Jurisprudence* at page 900:

"The doctrine of last clear chance, otherwise known as the doctrine of discovered peril, as the doctrine of supervening negligence, and, less frequently, as the humanitarian doctrine, stated broadly, is that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant by exercising reasonable care and prudence might have avoided injurious consequences to the plaintiff notwithstanding the plaintiff's negligence."

While there are a variety of opinions as to the precise interpretation and application of this broadly stated doctrine to specific factual

⁶There is an excellent annotation on this subject in 92 A.L.R. 47 (1934), supplemented in 119 A.L.R. 1041 (1939) and 171 A.L.R. 365 (1947).

situations, a majority of jurisdictions apparently recognize the following five elements, all of which must be present in order to invoke the doctrine: (1) The injured party has negligently subjected himself to a risk of injury from another; (2) immediately before the accident the injured party was unable to extricate himself from the perilous situation by the exercise of reasonable care; (3) the second party knew, or by the exercise of reasonable care should have known, of the injured party's peril; (4) the second party thereafter had a reasonable opportunity to avoid the accident; and (5) the second party then failed to use reasonable care to prevent the injury.

In the leading Mississippi case on this doctrine,⁷ our Supreme Court defined it thusly:

"The rule is settled beyond controversy or doubt . . . that the contributory negligence of the party injured will not defeat the action if it is shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequence of the injured party's negligence. This last principal is known as the doctrine of the 'last clear chance.'"

Later in its opinion the Court quoted with approval an even more succinct definition from 2 *Quarterly Law Review*, page 207:

"The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it."

Under this latter definition the doctrine could be invoked by either the plaintiff or the defendant according to the circumstances of the particular case; and, indeed, there is no logical reason why the doctrine should not be equally available to either party if the necessary elements are present to warrant its application.

III. ORIGIN AND BASIS OF THE DOCTRINE

Although the English judges who decided the case little knew that they were giving birth to a legal doctrine that was destined to spread throughout the common law world, the doctrine is generally traced to the famous case of *Davies v. Mann*.⁸ In that case the plaintiff, who had negligently left his donkey fettered in the highway so that it could not get out of the way of carriages, was allowed to recover from the defendant, who negligently drove his carriage against the donkey.

⁷Fuller v. Illinois Cent. R. Co., 100 Miss. 705, 56 So. 783 (1911). This is the leading case in this jurisdiction on the last clear chance doctrine not only because of its careful and detailed consideration of the doctrine, but also because it is the only Mississippi case to specifically discuss the doctrine.

⁸10 Mees & W. 548, 152 Eng. Reprint 588, 19 Eng. Rul. Cas. 190 (1842).

This decision followed by some thirty-three years the decision in the case of *Butterfield v. Forrester*,⁹ which first clearly enunciated the rule that contributory negligence on the part of the plaintiff would bar a recovery by him. It is apparent, however, from the opinions of the judges who rendered the historic decision in the *Davies* case, that they did not consider their decision as conflicting with the earlier rule of the *Butterfield* case, but merely as pointing out an obvious limitation to that rule. All of the judges apparently felt—although some of the reported opinions are somewhat ambiguous—that contributory negligence, which would bar a recovery by the plaintiff under the rule of the *Butterfield* case, consisted solely of negligence which proximately contributed to the accident and that the negligence of the plaintiff in the *Davies* case was too remote to be a proximate cause of the accident. This interpretation of the decision is strengthened considerably by the fact that the narrow issue for decision in the *Davies* case was the propriety of giving an instruction to the effect that the negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action unless the donkey's being there was the immediate cause of the injury.

Assuming this to be the correct interpretation of the decision, it becomes readily apparent that the doctrine of the last clear chance is not a separate substantive rule of tort law; but it is simply a test to apply to any given factual situation involving negligence on the part of the plaintiff to determine whether his negligence is a proximate contributing cause of the accident, or simply a remote condition but for which the accident would not have happened. The doctrine is not an exception engrafted onto the contributory negligence rule but is merely a device to be used to determine whether the plaintiff's negligence is contributory—i.e., is a proximate cause of the accident—or whether it is only remotely related to the accident.

Although the importance of the decision was not immediately apparent to the judges who rendered it, this rationale of the case was soon seized upon as a convenient means of circumventing the inherently harsh rule that contributory negligence on the part of the plaintiff precluded any recovery from a negligent defendant, regardless of the proportion of negligence attributable to each. And the vast majority of jurisdictions that have adopted the doctrine have justified it on the basis of proximate cause. The Mississippi Supreme Court, during the course of its decision in the *Fuller* case, specifically stated in clear and unambiguous terms that "the rule in *Davies v. Mann* simply furnishes a means for ascertaining whether the plaintiff's negligence is a remote or

⁹11 East 60, 103 Eng. Reprint 926, 19 Eng. Rul. Cas. 189 (1809).

proximate cause of the injury"

While the doctrine was laudatory at the time of its adoption and vitally necessary to alleviate the harshness of the contributory negligence doctrine, it is inherently fallacious in that it assumes that a definite and fixed line can be drawn between negligence which is a proximate cause and negligence which merely constitutes a remote condition. Actually the distinction between the two is purely arbitrary, and the position of the dividing line in any specific lawsuit depends upon the personal opinion of the particular judge or court hearing the case as to the outcome which will best promote justice between the litigants. This lack of definiteness is not necessarily bad, particularly in those jurisdictions which adhere to the strict contributory negligence rule, because some flexibility and discretion must be vested in the judiciary in order that the mantle of justice can be stretched to cover the myriad factual situations which can and do arise.

Some courts, recognizing this fallacy and desiring to further ease the strictness of the contributory negligence rule, have expressly held that the last clear chance doctrine does not rest upon any theory of proximate cause, but is a true exception to the contributory negligence rule in that it operates to permit a recovery in spite of negligence by the plaintiff proximately contributing to the accident.¹⁰

There is another inexplicable inconsistency in the last clear chance doctrine if it be based on the proximate cause theory. Assuming the evidence shows that the defendant had the last chance to avoid the accident and the other requisite elements are present, the jurisdictions basing the doctrine on the proximate cause theory would hold as a matter of law that the negligence of the plaintiff was not a proximate contributing cause of the accident, but merely a remote condition which would not preclude his recovery. However, under the same facts, no jurisdiction has denied a passenger in a vehicle a recovery against his host where the vehicle collided with another and the passenger sued both drivers; although if the doctrine were applicable as between the host driver and the other driver, then logically there is no reason why it would not be equally applicable in a suit brought by the passenger.¹¹ The mere addition of a passenger in one of the vehicles should not, in and of itself, convert the negligence of the host driver from a remote condition to a proximate contributing cause.

¹⁰92 A.L.R. 53 (1934).

¹¹In 65 C.J.S., Negligence § 136 at 759 this inconsistency is noted and is lightly passed over by stating that because "the doctrine is one involving nice distinctions, often of a technical nature, . . . the courts should be wary in extending its application. Accordingly, the doctrine cannot be extended into the field of joint tortfeasors, as a test of whether one of them only should be held liable to the injured person by reason of having discovered his peril."

IV. APPLICATION OF THE DOCTRINE IN MISSISSIPPI

From the adoption of the comparative negligence statute in 1910¹² until the two recent federal court cases were decided,¹³ the doctrine of the last clear chance had not been used as the foundation for any decision involving Mississippi law by any court whose decisions are reported. The inception of the quiescent state of the last clear chance doctrine with the adoption of the comparative negligence statute is certainly indicative of the fact that most practitioners thought that the new comparative negligence system superseded not only the antiquated contributory negligence rule, but also the concomitant doctrine of the last clear chance.

The comparative negligence statute by its plain terms unequivocally abolished in Mississippi the inequitable common law rule of contributory negligence as formulated and announced in the *Butterfield* case.¹⁴ As a matter of fact, the Mississippi statute, as interpreted and applied by our courts, is more liberal than that of any other jurisdiction because it allows a recovery by a party irrespective of the degree of negligence attributable to him.¹⁵ This marks the first time in the gradual but continuous development of tort law that a system has been devised in a common law jurisdiction which considers simultaneously the two essential ingredients involved in any tort—i.e., the negligence attributable to each party and the damages sustained by each—and allows a recovery by the party whose net claim resulting from the accident exceeds the net claim of the other.¹⁶ The ancient unjust rule denying recovery to any person who has been guilty of contributory negligence, regardless of the degree or amount of damages sustained by that party, has evolved by a gradual process into an equitable and just system whereby, within the limit of human frailties, the degree of negligence attributable to each party and the amount of damages suffered by each is taken into account in returning a verdict which, at

¹²Miss. Laws 1910, c. 135 (Miss. Code Ann. § 1454 (1942)).

¹³*Underwood v. Illinois Cent. R. Co.*, 205 F.2d 61 (5th Cir. 1953); *Illinois Cent. R. Co. v. Underwood*, 235 F.2d 868 (5th Cir. 1956).

¹⁴The full text of the statute is: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

¹⁵*Crosby Lumber & Mfg. Co. v. Durham*, 181 Miss. 559, 179 So. 285 (1938); *McClellan v. Illinois Cent. R. Co.*, 204 Miss. 432, 37 So.2d 738 (1948).

¹⁶This statement is particularly true since the adoption of the tort counterclaim statute in 1952. (Miss. Code Ann. § 1438.5 (1942), under which the claims of both parties can be determined and compared in one proceeding and a final verdict rendered.

least in theory, results in equal justice to all concerned. And since decisions must always be rendered by humans, whose judgment can never be perfect, the best we can hope to achieve is perfection in theory.

While the comparative negligence statute unquestionably abrogated the contributory negligence rule, it does not in express terms repudiate the last clear chance doctrine. The problem which has been hovering in the background since 1910 and which was brought into sharp focus by the recent federal court decisions¹⁷ is whether the statute by necessary implication eliminates the doctrine from the jurisprudence of this jurisdiction or whether the doctrine can logically be engrafted onto our system of comparative negligence. In the event it be determined that the doctrine does not necessarily conflict with the comparative negligence statute but can exist in harmony with our present system, the further problem arises as to whether its adoption, or re-adoption, will promote or impede justice under our system.

Regardless of the fallacies inherent in the proximate cause basis of the last clear chance doctrine, that theory has received specific and detailed judicial approval in this State;¹⁸ and, as a practical matter, we are committed to it until that decision is subsequently modified or reversed by our Supreme Court. This means, in effect, that if the requisite elements for the application of the doctrine are present, the negligence of the plaintiff is, as a matter of law, a remote condition and not a proximate contributing cause of the accident.

This conclusion assumes added importance when it is studied in conjunction with our comparative negligence statute, which applies by its terms to persons who "may have been guilty of contributory negligence." Contributory negligence, of course, means negligence which proximately contributes to the accident, not negligence which is merely a remote condition. Thus, the statute excludes from its operation not only those persons who have been guilty of no negligence, but also those whose negligence constitutes merely a remote condition since it limits its applications to those guilty of contributory negligence.

Disregarding for the moment the fallacy inherent in attempting to distinguish between negligence which is a proximate cause and negligence which is a remote condition, there is no logical inconsistency between the last clear chance doctrine, considering it as a test to determine whether the plaintiff's negligence is proximate or remote, and

¹⁷See note 13 *supra*.

¹⁸In *Fuller v. Illinois Cent. R. Co.*, *supra* note 7, the court, in addition to previously quoted passages, also stated: "Our conclusion is that the predicate upon which the principal in *Davies v. Mann* and the cases following that authority is based is that the defendant's liability is enforced because his negligence is the proximate cause of the injury."

the comparative negligence statute, which can be invoked by the defendant only when the plaintiff's negligence is a proximate contributing cause of the accident. In a particular case, if the court were to find as a matter of law or the jury, under appropriate instructions, were to find as a matter of fact that the defendant had the last clear chance to avoid the accident and that the other elements necessary to bring the doctrine into play were present, then the negligence on the part of the plaintiff would be remote and, accordingly, could not be considered by the jury in reducing the plaintiff's damages. To use a specific example—the results in the *Fuller* case, which was decided under the last clear chance doctrine prior to our adoption of the comparative negligence statute, should not logically have been any different if it had been decided a year later under the comparative negligence statute. In either case if the last clear chance doctrine were applicable, the negligence of Fuller in driving on the railroad track with complete obliviousness to the approaching train would be a remote condition, not a proximate contributing cause. Under the contributory negligence rule such remote negligence would not preclude recovery; and under the comparative negligence system it would not justify a reduction in the amount of damages, if the last clear chance doctrine were applicable in each case.

If the basic fallacious premise of the last clear chance doctrine (i.e. that there is a definite and fixed dividing line between negligence which is remote and that which is proximate) is ignored, a valid argument can be made in support of the view that the adoption of the comparative negligence statute was not intended to and did not supersede the last clear chance doctrine; but that, on the contrary, the doctrine still has a place in our jurisprudence, serving as a test to determine whether the plaintiff's negligence is a proximate contributing cause resulting in a reduction of his damages under the comparative negligence statute, or whether such negligence is merely a remote condition which will not justify the jury in reducing the plaintiff's damages.

The propriety and advisability of resurrecting the last clear chance doctrine is, however, very debatable.

A cursory examination of the history of delictual law since 1809 shows clearly the progress that has been made since the *Butterfield* case adopted the strict rule that any contributory negligence on the part of the plaintiff would bar a recovery by him. The enunciation of the last clear chance doctrine in 1842, even though unwittingly done, was the first step in ameliorating the harshness of the contributory negligence rule; and later this doctrine was made even more liberal in some jurisdictions by repudiating the proximate cause basis of the doctrine and extending it to cover those cases in which the negligence of the plain-

tiff admittedly contributed to the accident. This doctrine was subject to the same criticism as the contributory negligence rule, however, because neither made any provision for comparing the degree of negligence of each party. Under the contributory negligence rule the plaintiff was precluded from recovering anything if he were guilty of any negligence which proximately contributed to the accident; but if the last clear chance doctrine were applicable, the plaintiff could recover the full amount of his damages without any reduction whatsoever because of his antecedent negligence. While this latter situation might be justified or rationalized by resorting to the legal fiction of proximate cause, it merely served to shift the full burden of bearing the loss from the plaintiff to the defendant, which manifestly was unfair in many instances where the antecedent negligence of the plaintiff, even though legally remote, was actually closely connected to the accident. The *Fuller* case is an excellent illustration, for who can say that the negligence of Fuller in failing to see the approaching train was any less responsible for the accident than the negligence of the engineer in failing to observe the wagon in which Fuller was riding, yet under that decision Fuller's heirs were entitled to recover full damages resulting from the accident. All of the acts and omissions of both parties from the time they first came into each other's range of vision are pertinent in fixing the blame, or more precisely the proportion of fault attributable to each; and the jury should be entitled to weigh all of these acts in determining the degree of negligence of each party. Then by applying those percentages to the total amount of damage sustained by each party, the jury can more accurately determine the amount of damage for which each party is responsible; and neither is penalized by having to assume the full burden when both were, at least partially, at fault.

And that is precisely the result reached—at least in theory—under the comparative negligence statute as it is applied in Mississippi. While we still pay lip service to the common law fiction of proximate cause and remote condition, in practice the tendency is to allow the jury to take into consideration in its deliberations all acts of negligence of both parties which reasonably relate to the accident. In effect this means that the phrase "contributory negligence" as used in our comparative negligence statute is no longer defined in terms of proximate or remote cause; but it is used to encompass all acts of the party which fall below the standard of reasonable care and which reasonably relate to the accident.¹⁹ It is true that there is still a subjective element

¹⁹The criticism here is not directed against the concept of proximate cause which requires a causal connection between the negligence and the injury, but against the artificial distinction between proximate cause and remote condition when there is a causal connection between such act or omission, regardless of its designation, and the resulting injury. The space limitation prevents an extended discussion

present in determining what acts reasonably relate to the accident; but under this system it becomes the function of the jury in determining the degree of negligence attributable to each to weigh all the acts and omissions of both parties as shown by the admissible evidence and not to arbitrarily and completely disregard admittedly negligent acts of one simply because in an effort to do better justice such acts have been designated in legal jargon as a remote condition rather than a proximate cause. The relationship of the various acts of both parties to the ultimate accident is the same regardless of the nomenclature ascribed to them; and all of the acts are instrumental in causing the accident. The difference is simply one of degree; and it is solely within the province of the jury under our comparative negligence statute to determine the degree of importance of each act of both parties in causing the accident.

V. CONCLUSION

Admittedly the application of the comparative negligence statute is imperfect, but perfection can never be achieved as long as the human element is involved. It is equally obvious that the adoption of the comparative negligence statute and the liberal interpretation given to it by our courts is another progressive step forward in our unending quest to achieve perfect justice for all litigants. The resurrection of the last clear chance doctrine would serve no useful purpose under our system because the doctrine is no longer needed to ameliorate the strictness and injustice of the contributory negligence rule. Instead of having a beneficial effect as was intended and accomplished by its formulation,

of this point, which well could be the subject of a lengthy article itself. Suffice it to say that the proximate cause concept, which arose and developed during the time the law emphasized the technical distinctions resulting from the contributory negligence rule and the last clear chance doctrine, could well be studied with a view toward redefining it on the basis of a causal connection between the negligence and the injury, since our modern jurisprudence in this State has largely swept away those archaic technical distinctions and replaced them with a system which is more concerned with reaching a result consonant with justice under the facts of the case than with adhering rigidly to technical niceties. The requirement of proximate cause in tort cases would not be abolished; but the test would be whether there was a reasonable relationship, a causal connection, between the negligent act or omission and the injury or damage. The two fundamental questions in the trial of any tort action would then be whether the party's conduct fell below the standard of the average reasonable man so as to constitute negligence and, if so, whether there was a causal connection between such conduct and the resulting injury or damage so as to satisfy the requirement of proximate cause. If both questions were answered in the affirmative, then the comparative negligence statute would be applied to ascertain the proportion of negligence attributable to each, which percentage would, in turn, be used to determine the net amount of damage for which each party was responsible. This interpretation of proximate cause would increase the number of cases in which a party could recover by eliminating the concept of remote condition when there was a causal connection present; but since such recovery would not be for the full amount of his damage as in other jurisdictions, but only for the proportion attributable to the fault of the other party, a more equitable result would be reached.

the doctrine would hamper the administration of justice in our courts by unnecessarily restricting the application of the comparative negligence statute. The passage of time and the development of a new system has converted a liberal progressive doctrine into an anachronism.

And finally it should be noted that there was no necessity to resort to the last clear chance doctrine to arrive at the decision which the Fifth Circuit reached in the two *Underwood* cases. The fundamental question in both cases was not whether the train crew had the last clear chance to avoid the accident, but whether the evidence showed any negligence whatsoever on their part. That is the basic question confronting any court in this jurisdiction when a request for a peremptory instruction is made, for if there is no negligence on the part of the defendant there is none to compare. Had the Fifth Circuit on the second appeal adhered to its original view that the last clear chance did apply, we would have had the anomalous situation of a grossly negligent plaintiff recovering the full amount of his damages. Such an inequitable result is possible under the last clear chance doctrine; but fortunately under our comparative negligence statute a more equitable result can be reached without resort to a legal fiction.

COMPETENCY OF A DEFENDANT TO TESTIFY WHEN SUED UNDER THE WRONGFUL DEATH STATUTE

*Curtis E. Coker**

A general discussion of either the "Wrongful Death Statute"¹ or the "Dead Man Statute"² would necessitate a review of all decisions in evaluating the various situations to which they have been separately applied³ and would be both inappropriate and fruitless here. Our point of inquiry and concern will be confined, except as divergence and review seem helpful, to the narrow question of whether a defendant, being sued under the Wrongful Death Statute, may testify in his own defense without violating the prohibition of the Dead Man Statute.

Although, as stated, no general attempt at evaluating the application of either statute to all situations will be made, some review of each seems necessary before any conclusion can be offered on the question involved.

I. THE DEAD MAN STATUTE

Apparently from the beginning of modern witnesses, the party directly involved in the suit was incapable of testifying,⁴ and after Lord Coke's commentary printed in 1642, the rule was extended to interested parties in general.⁵ In explaining the common law rule, Mr. Wigmore says:

"The theory of disqualification by interest was merely one variety of the General Theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premises of which, though they may now seem fallacious enough, were in the 1700's accepted as axioms of truth. Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; the persons having a pecuniary interest in the

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¹Miss. Code Ann. § 1453 (1942).

²Miss. Code Ann. § 1690 (1942).

³See Comment, 13 Miss. L. J. 571 (1941), for general discussion of the Wrongful Death Statute, and Comment, 6 Miss. L. J. 409 (1934), for general discussion of the Dead Man Statute.

⁴II Wigmore, Evidence § 575 (3rd ed. 1940).

⁵*Ibid.*

⁶*Id.* at § 576.

⁷6 & 7 Vict., c. 85 (1843).

event of the case are specially likely to speak falsely; therefore, such persons should be totally excluded."⁶

Lord Denmans Act⁷ removed the disqualification of "interested persons" to testify in the English courts, and eight years later a similar statute⁸ accomplished the same results insofar as the parties themselves were concerned. Like practically all other jurisdictions in the United States, Mississippi followed the example set by England by enacting a statute in 1857,⁹ which removed the common law disability with the exception that: "No person shall be a witness in any suit by, or against himself to establish his own claim to an amount exceeding fifty dollars, against the estate of a deceased person." Various legislative enactments through the years have resulted in a separation of the original qualifying statute from its disqualifying exception, the pertinent part of which reads as follows:

"A person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent"¹⁰

The stated purpose of the statute is to guard against the temptation on the part of the surviving party to give false testimony in establishing his claim or defense where death has sealed the lips of the other party to the transaction. In other words, what death has done to one, the law does to the other, and the inability to testify is made "mutual," thereby preventing a dead man's estate from being depleted by the survivor setting up false claims or defenses.¹¹ It is not the purpose of this article to either criticize or approve the statute, or its application and construction by the Supreme Court, although the whole philosophy underlying its passage has come under fire by both text-writers and the courts.¹²

The courts have shown an amazing divergence in determining the construction to be put on the statute,¹³ holding that the provisions will be enforced only where a case falls strictly within the wording of

⁸Lord Brougham's Act, 14 & 15 Vict., c. 99 (1851).

⁹Revised Code of 1857, c. 61, art. 190.

¹⁰Miss. Code Ann. § 1688 (1942), provides in part: "Every person, whether a party to the suit or not, shall be competent to give evidence in any suit at law or in equity, and shall not be incompetent by reason of any interest in the result thereof . . ."; while the disqualifying provision now appears as § 1690.

¹¹Griffin v. Lower, 37 Miss. 458 (1859); Witherspoon v. Blewett, 47 Miss. 570 (1873); 3 Jones, Evidence § 773 (4th ed. 1938); Wigmore, op. cit. supra note 1, § 578; 58 Am. Jur., Witnesses, § 215.

¹²Wigmore, op. cit. supra note 1, § 578; St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895); Schampon v. Speis, 285 Ill. App. 23, 1 N. E. 2d 499 (1936); Corbett v. Kingan, 19 Ariz. 134, 166 P. 290 (1917); Freeman v. Berberich, 332 Mo. 831, 60 S. W. 2d 393 (1933).

¹³58 Am. Jur., Witnesses, § 216.

the statute;¹⁴ that the statute will be strictly construed;¹⁵ and that a liberal construction should be applied.¹⁶ The Mississippi Supreme Court has been brought to task for failure to recognize the "arbitrary nature of the rule" and fall into line with the trend shown in other jurisdictions of admitting rather than excluding evidence when possible,¹⁷ it being said:

"Mississippi, however, continues to apply the rule with all rigor-ousness, the Court being careful to interpret the statute literally, yet broadening the terms in their application according to their interpretation of the 'reason and intendment' of the statute."¹⁸

Of course, it is important to the subject here to determine whether the Mississippi Court puts a "liberal" or "strict" construction on the statute, but the truth is that, contrary to the conclusion reached by the author of the note cited above, it is difficult to tell just where the Court does stand. It is true that the Court has applied the "reason and intendment" rule in excluding the testimony of a surviving party,¹⁹ and has said that the purpose of the statute is salutary,²⁰ but it is also true that the Court, in the case of *Shepherd v. Johnston*, said:

"Section 1690, Code 1942, prohibiting a person from testifying as a witness to establish his own claim against the estate of a deceased person, created an exception to the general rule as to the competency of a witness; and being an exception, *it must be strictly construed in favor of the competency of the witness . . .*"

and as regards the "spirit and intendment" rule, the Court went on to say:

"The exception must come within *both the letter and the spirit* of the statute."²¹ (Emphasis added).

A careful review of the Court's decisions using the "spirit and intendment" test reveals that the question involved was whether the provisions of the statute extended to tort actions, and the Court, from the very beginning, held that tort actions were embraced within its meaning.²² Although the Court has been criticized for this view, it

¹⁴*Ibid.*

¹⁵³ Jones, op. cit. supra note 11, § 772.

¹⁶*Brown v. Adams*, 174 N. C. 490, 93 S. E. 989 (1917).

¹⁷Comment, 6 Miss. L. J. 409 at 415 (1934).

¹⁸*Id.* at 411.

¹⁹*Griffin v. Lower*, 37 Miss. 458 (1859); *Witherspoon v. Blewett*, 47 Miss. 570 (1873).

²⁰*Cross v. Frost*, 86 So.2d 296, 298 (Miss. 1956).

²¹201 Miss. 99, 28 So.2d 661 (1947).

²²*Lamar v. Williams*, 39 Miss. 342 (1860), where the Court observed that if a claim was to be interpreted in the sense of a fixed debt, then "a plaintiff in any action ex delicto against the estate of a decedent, the cause of which had accrued in

seems to accord with the view of most other jurisdictions where the statute does not specifically exempt tortious acts from its terms.²³ The rule that the statute applies in tort actions has been applied as recently as 1956, in the case of *Cross v. Frost*, where a surviving motorist brought action against the administrator of a deceased motorist who was driving the other car in a two-car collision, the Court specifically reaffirming *Lamar v. Williams*.

In another, more recent, decision,²⁴ the appellee was injured while riding in a taxicab which was struck from the rear by a Mercury automobile driven by George Benison. Benison was killed as a result of the collision. Appellee sued the estate and was allowed to testify concerning the accident. The Court said:

"Appellant Bertha Benison, Administratrix of the estate of George Benison, deceased, contends that Mrs. Snowden was incompetent to testify against the estate of the Administratrix' deceased, under Code Section 1690, which provides that a person shall not testify to establish his own claim against the estate of a deceased person which originated during the life time of such deceased person. With that we agree. *Cross v. Frost*, Miss. 1956, 86 So. 2d 296 . . ."

It should be very carefully noted that in all the tort actions to which the statute has been applied, suit was brought *against the estate of a deceased person*, and once it was determined that the statute applied to tort actions, the testimony of the party bringing the suit would seem to fall, not merely within the "spirit and intendment" of the statute, but in the very teeth of its language. Note especially, however, that *not one of the cases involved the reverse situation* wherein the beneficiaries under the Wrongful Death Statute were bringing suit, either through the personal representative of the deceased, or individually, against the survivor of an automobile collision or other possible tortious situation.

Considering now what the "estate of a deceased person" consists of, the Court, following an earlier line of decisions,²⁵ has said:

his lifetime, or for the recovery of a specific chattel, would have the right to testify in his own behalf; and any defendant sued by the representative of a decedent for a cause of action which accrued in the decedent's lifetime would be authorized to testify to anything which would avoid the demand . . . because that would not be to set up any 'claim' against the estate. But this is clearly in contravention of the policy of the statute . . . because an undue advantage would thereby be given to the living party, by enabling him to testify to matters which took place between him and the decedent, and which, resting entirely in the private transactions of the parties, could not be disproved or explained by reason of the death of the other party."

²³58 Am. Jur., Witnesses, § 223.

²⁴*Reynolds v. Snowden*, 92 So.2d 232 (Miss. 1957).

²⁵*Jacks v. Bridewell*, 51 Miss. 887 (1876); *Jackson v. Johnson*, 126 Miss. 26, 88 So. 410 (1921); *Green v. Mizell*, 54 Miss. 220 (1876); and *Jackson v. Smith*, 68 Miss. 53, 8 So. 258 (1890).

"The exclusion of testimony, in which the controversy is between him who would testify to a claim and right as administrator, extends to every assertion of such right by a party to any part of an estate left by a deceased person and claimed by such person, or to be subject to a demand by reason of an alleged transaction between such party and deceased person."²⁶

In order for the prohibition against testifying to apply, the claim or defense must be against the estate of the deceased person,²⁷ and the estate must be directly affected.²⁸ Thus, in the case of *Security Mutual Life Ins. Co. v. Brunson*,²⁹ the Court, affirming the lower court which allowed testimony where the estate of the deceased was not a necessary party to the action, said:

"That his estate may be affected prejudicially in consequence of the result of this suit in W. E. Brunson's favor, and a future action by the insurance company against that estate, does not render W. E. Brunson incompetent as a witness in the present suit. 'To exclude a party as a witness to prove his own claim or right, it must be against the estate of a deceased person in the suit in which he proposes to testify.'"

Again, in the case of *Clapper v. Powers*,³⁰ it was said:

"The appellants also assign as error that the Chancellor erred in permitting the appellees . . . to testify, for the reason that their testimony sought to establish their claim against the estate . . . Contrary to the provisions of Section 1690 of the Mississippi Code of 1942. We think that the contentions under this assignment are not well taken The estate of Mrs. J. M. Durst, deceased, is only indirectly involved and the statute relied upon applies to a direct claim of the witness and not an indirect one."

Further, in *Shepherd v. Johnson*,³¹ the Court reviewed the cases on the subject as follows:³²

²⁶*Elmer v. Holmes*, 189 Miss. 785, 199 So. 84 (1940).

²⁷*Coleman v. Kierbow*, 212 Miss. 541, 54 So.2d 915 (1951).

²⁸*Love v. Stone*, 56 Miss. 449 (1879); *Fennell v. McGowan*, 58 Miss. 261 (1880); *Garner v. Townes*, 134 Miss. 791, 100 So. 20 (1924).

²⁹176 Miss. 893, 170 So. 824 (1936).

³⁰222 Miss. 99, 222 Miss. 878, 77 So.2d 808, 814 (1955).

³¹201 Miss. 99, 28 So.2d 661 (1947).

³²Citing *Faler v. Jordon*, 44 Miss. 283 (1870); *Love v. Stone*, 56 Miss. 449 (1879); *Fennell v. McGowan*, 58 Miss. 261 (1880); *Combs v. Black*, 62 Miss. 831 (1883); *Cole v. Gardner*, 67 Miss. 670, 7 So. 500 (1890); *Jones v. Warren*, 70 Miss. 227, 14 So. 25 (1893); *Jones v. Bank*, 71 Miss. 1023, 16 So. 344 (1894); *Horne v. Nugent*, 74 Miss. 102, 20 So. 159 (1896); *Cook v. Abernathy*, 77 Miss. 872, 28 So. 18 (1900); *Cockrell v. Cockrell*, 83 Miss. 385, 36 So. 390 (1903); *Garner v. Townes*, 134 Miss. 791, 100 So. 20 (1924); *Davis v. Crawford*, 175 Miss. 493, 168 So. 261 (1936); *Security Mutual Life Ins. v. Brunson*, 176 Miss. 893, 170 So. 824 (1936); *McFarlane v. Plant*, 185 Miss. 616, 188 So. 530 (1939).

"The previous decisions of this Court are to the effect that the testimony should be in support of a direct claim of the witness against the estate of the deceased person, as distinguished from an indirect or consequential claim against the estate, in order to render it incompetent

"Without reviewing in detail the holdings of the foregoing decisions, it is sufficient to call particular attention to the holding in the cases of *Love v. Stone*, *Fennell v. McGowan*, and *Garner v. Townes*, supra, which declare the rule to be that in order to effect a disqualification of an interested witness, the estate of the decedent *must be directly affected by the pending suit.*" (Emphasis added).

From the cases heretofore studied, it would seem that certain broad principles may be stated with some degree of confidence, viz: (1) the estate of a deceased person as used in the statute is used in its broad and popular sense to signify all the property of every kind which one leaves at his death; (2) the statute will apply to disqualify a witness from testifying, when, but only when, a claim or defense of a litigant is against the estate of a deceased person,³³ and actions sounding in tort are included; (3) the estate of such deceased persons must be directly, as opposed to indirectly, or consequentially, affected.

II. THE WRONGFUL DEATH STATUTE

Our interest in the Wrongful Death Statute³⁴ arises from the fact that at common law no action could be maintained to recover damages for the death occasioned by the negligent or other wrongful act of another³⁵ and the damages sustained by the decedent could not have formed any part of his estate so as to raise the problem of the survivor being disqualified to testify concerning the circumstances surrounding the accident or tortious death. In other words, had no change been made in the common law, and had two motorists collided as in *Cross v. Frost*,³⁶ and *Reynolds v. Snowden*,³⁷ and the survivor been sued, the question of such defendant survivor's disqualification under the Dead Man Statute could not have arisen because the suit would not have been maintainable at law. The common law doctrine, however, was

³³Although estates of persons of unsound mind are included within the statute, no consideration has been given that provision because the "Wrongful Death Statute" could have no application.

³⁴Miss. Code Ann. § 1453 (1942).

³⁵16 Am. Jur., Death §§ 344, 345; 1 Am. Jur., Abatement and Revival, § 83; *Kirkpatrick v. Ferguson - Palmer Co.*, 116 Miss. 874, 77 So. 803 (1917); *S. H. Kress and Co. v. Lindsey*, 262 F. 331 (5th Cir. 1919), 13 A. L. R. 1170; 1 C. J. S., Actions, §45.

³⁶Supra note 20.

³⁷Supra note 24.

subjected to much criticism,³⁸ especially after the evolution of modern industry.³⁹ In England, as early as 1846, the common law rule was, in part, abrogated by the passage of Lord Campbell's Act,⁴⁰ which provided that whenever the death of any person is caused by the wrongful act, neglect, or default of another, in such manner as would have entitled the party injured to have maintained an action in respect thereof if death had not ensued, an action may be maintained if brought in the name of his executor or administrator for the benefit of certain specified relatives, within twelve months after his death.

In 1857, the same year in which the Dead Man Statute was enacted, the Mississippi Legislature passed the Wrongful Death Statute,⁴¹ in substantially the same form as Lord Campbell's Act. The historical changes in the Mississippi Act are given in the case of *Illinois Cent. R. Co. v. Fuller*,⁴² except for the addition of the allowance of an action for death caused by "the breach of any warranty" which was added after the court had restricted the meaning of the word "default" to tortious acts and refused to allow recovery in a suit brought by a widow alleging her husband's death was caused by eating a portion of cocoa-nut pie manufactured and sold by the defendant, the Court holding that the lower court should have sustained the demurrer to the declaration which "is meticulously drawn to ground the action upon breach of implied warranty."⁴³

As the answer to our question must rest upon the further question of whether the action under the Wrongful Death Statute involves the establishing of a claim or defense *against the estate* of a deceased person which originated during the lifetime of such deceased person, the pertinent parts of the statute should be, and are, set out directly as follows:

"Whenever the death of any person shall be caused by any real wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof . . . and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall,

³⁸*Salsedo v. Palmer*, 278 F. 92 (2nd Cir. 1921), 23 A. L. R. 1262 (1921).

³⁹*Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001 (1915).

⁴⁰8 & 10 Vict., c. 93 (1846).

⁴¹Revised Code of 1857, c. 61, art. 48.

⁴²106 Miss. 65, 63 So. 265 (1913).

⁴³*Hasson Grocery Co. v. Cook*, 196 Miss. 65, 17 So.2d 791 (1944).

in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person, for the benefit of all persons entitled under the law to recover or by the widow, for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death which shall ensue for the benefit of all parties concerned Damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

*"Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover."*⁴⁴ (Emphasis added).

From a quick glance at the quoted portions of the statute, it is easily perceived that two entirely distinct classes of suits are contemplated, depending upon the fortuitous circumstance of whether the deceased left husband, wife, child or other relatives, as set forth in the act. If he did, then any monies recovered by the way of damages shall be distributed as the statute specifies, without regard to his estate and without a single dollar being subject to payment of debts or liabilities of the deceased. On the other hand, if the deceased does not leave any relatives within the degree of kinship set forth in the statute, then the damages recovered become a part of the estate in the same manner and subject to the same liabilities as any property owned by the deceased at

⁴⁴Supra note 34.

the time of his death. It would seem at first blush, therefore, that in the latter case, the estate of the deceased which would have recovered monies available for normal administration and distribution would be directly affected in such an action, and that the defendant in such suit, would fall squarely within the prohibition of the Dead Man Statute and would be disqualified to testify. Such a case would seem to be rare and no conclusion will be attempted thereon here.⁴⁵

The more typical case involves deaths arising out of automobile collisions or other tortious situations, and in which the deceased leaves a wife, child or other close relative who is often times himself a witness to the alleged tort, who brings the action, or in whose behalf it is originated.

Obviously, in such case, it would be to the defendant's advantage to be able to testify in his own defense. Indeed, and especially in automobile collision cases, his testimony may be the only defense available. Although the Supreme Court of Mississippi has not ruled on the question, it has furnished some rules of construction which may shed some light on the solution.

In *Hasson Grocery Co. v. Cook*,⁴⁶ the Court held that the statute must be strictly construed,⁴⁷ and in *Burroughs v. Oliver*, the Court said:

"... the cause of action did not survive at common law; *that the statute creates a new and independent cause of action and that the statute must be strictly construed. It is well settled in this state that statutes in derogation of the common law will be strictly construed*" ⁴⁸ Emphasis added).

Although the executor or administrator of deceased may bring an action the deceased may have had at the time of his death,⁴⁹ including suit for injuries between the time of injury and death,⁵⁰ such action, and the right to bring it, is entirely separate and distinct from the action brought under the Wrongful Death Statute. "They may co-exist, but have no connection."⁵¹ Under the Wrongful Death Statute, even though recovery may be had only if the deceased could have recovered,⁵² it is not the cause of action of the deceased which survives,

⁴⁵As will be shown later, however, our Court has held that the statute is one creating a new cause of action, and for that and other possible reasons, no hasty conclusion should be drawn.

⁴⁶Supra note 43.

⁴⁷Citing *McNeely v. City of Natchez*, 148 Miss. 268, 114 So. 484 (1927).

⁴⁸217 Miss. 280, 64 So.2d 338 (1953).

⁴⁹Miss. Code Ann. § 611 et. seq., 728 (1942).

⁵⁰*Natchez J. & C. R. Co. v. Cook*, 63 Miss. 38 (1885).

⁵¹*Vicksburg & M. R. Co. v. Phillips, Admix.*, 64 Miss. 693, 2 So. 537 (1887).

⁵²*Kirkpatrick v. Ferguson - Palmer Co.*, 116 Miss. 874, 77 So. 803 (1918).

but a new cause which has been created. As stated by the Court in *Hasson Grocery Co. v. Crooks*:⁵³

"That such cause of action did not survive at common law is clear. *Kirkpatrick v. Ferguson-Palmer Co.*, 116 Miss. 874, 77 So. 803; *S. H. Kress & Co. v. Lindsey*, 5 Cir. 262 F. 331, 13 A. L. R. 1170; 1 C. J. S., Actions, Sec. 45, p. 1099; 1 Am. Jur., Abatement and Revival, Sec. 83. The statute is not one of survival but creates a new and independent cause of action."⁵⁴

III. THE STATUTES CONSIDERED TOGETHER

It is true that the Court in considering the Dead Man Statute alone, has indicated that in any suit instituted by or against the representative of a decedent, the surviving party could not testify.⁵⁵ For example, in *Cross v. Frost*,⁵⁶ it was said:

"The spirit and policy of the proviso appear clearly to be, that a living party, either plaintiff or defendant, *in an action in which the representatives of a decedent's estate are a party*, shall not be competent to testify in his own behalf to establish his demand or right, asserted and relied on in the action, against the estate, if the matter exceed the sum of fifty dollars. . . ." (Emphasis added).

It cannot be overemphasized, however, that the Wrongful Death Statute was not under consideration and the statutes were not being considered together. In point of fact, the *estate* of the deceased person could have no interest whatsoever in the outcome of such a suit when the living relatives would take the entire recovery whether the suit were instituted in the name of the administrator or was brought by the immediate beneficiaries, as defined in the statute.

If the action were brought by the administrator, and a recovery had, the estate would gain nothing. If, on the other hand, no recovery were made, the estate would have lost nothing. In other words, the estate has no interest in the outcome of such an action, and where the action is not instituted by the administrator, he is not a necessary party,⁵⁷ and where it is instituted by him, he is a nominal party only.⁵⁸ As stated in *Thames v. Mississippi*:⁵⁹

⁵³Supra note 43.

⁵⁴Citing *Thames v. Mississippi*, 117 F.2d 949 (5th Cir. 1941), 136 A. L. R. 926, cert. denied, 314 U. S. 630 (1941); *St. Louis & S. F. R. Co. v. Moore*, 101 Miss. 768, 58 So. 471, 39 L. R. A. (N. S.) 978 (1911); 25 C. J. S., Death § 15; 16 Am. Jur., Death, § 61; *Tiffany*, Death by Wrongful Act, § 23 (2d ed. 1893).

⁵⁵*Wood v. Stafford*, 50 Miss. 370 (1874).

⁵⁶86 So.2d 296 (Miss. 1956).

⁵⁷*Mississippi Power & Light Co. v. Smith*, 169 Miss. 447, 153 So. 376, (1934).

⁵⁸*Mississippi Power & Light Co. v. Archibald*, 189 Miss. 332, 196 So. 760 (1940).

⁵⁹*Thames v. Mississippi*, 117 F.2d 949 (5th Cir. 1941), 136 A. L. R. 926 (1941).

"... an administrator suing under the Mississippi statute was held to be a nominal party without title or interest, whose citizenship is to be disregarded.

"The question is whether the person for whose 'use and benefit' the State is suing is the administrator, or the mother and father and brother. It is not to be answered by the fact that the administrator is put forward as suing any more than by the fact that the State is put forward. The real use and benefit belong only to the father and mother and brother, and the administrator has no more actual interest than the State. The true usees are the mother and father and brother. *Mississippi Power Co. v. Archibald*, 189 Miss. 332, 196 So. 760.

"If this suit be considered the exact equivalent of one in tort brought by an administrator under Section 510 of the Code of Mississippi the same conclusion must be reached. Section 510 gives a right of action for a death in case the party injured could have sued. It does not cause to survive or to be revived the deceased's right of action, but enables designated members of his family to recover damages, which are not subject to payment of the deceased's debts, and are to be 'such . . . as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.' *There can be but one suit*. It matters not which of the family beneficiaries sues, the proceeds belong to those entitled as if they all had been named as plaintiffs. *Kelly v. Howard*, 98 Miss. 543, 54 So. 10, Ann. Cas. 1913B, 229. The statute specifies how the damages are to be distributed to the family beneficiaries. But 'if the deceased have neither husband, or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal representative, subject to debts and general distribution The action for such damages may be brought in the name of the personal representative of the deceased person, for the benefit of all persons entitled under the law to recover or by the widow . . . or by the parent for the death of a child etc. In the present case there are a father, a mother, and a brother, who are the beneficiaries and could have sued in their own names; and the general estate of Grant has no interest at all in the recovery. The father and mother and brother did not sue, but chose to sue by an administrator selected by them having a different citizenship. Is he invested with a right of action as a trustee, or is he only a figurehead, virtually a next friend, a nominal party whose citizenship does not matter? We think his connection with and interest

in the right of action created by the statute depend on the construction of the statute, and involve therefore a question of State law on which the Supreme Court of Mississippi speaks with final authority. That court has spoken very recently and positively on the exact question presented here, in *Mississippi Power Co. v. Archibald*, supra, holding that the administrator is not a necessary party, has no interest either personally or as administrator, and is not even entitled to fees for paying over the money he recovers." (Emphasis added).

There is conflict in the opinions from other jurisdictions on the application of the Dead Man Statute when the action is brought under the Wrongful Death Statute,⁶⁰ but these conflicts are largely due either to differences in the wording of the statutes, or in the construction placed thereon by the court involved.

In an Indiana case⁶¹ the Court held that as in the absence of legislation no suit could have been maintained for the wrong in causing death, the right of recovery had been created, not in behalf of decedent's estate, but for the exclusive use of the widow, children, or next of kin, and that where there were such next of kin, the estate had no interest whatever in the suit, and the defendant could not be prohibited from testifying.⁶²

The Missouri Court, in *Enthwistle v. Feighner*,⁶³ said that as the cause was new and did not arise until death of decedent, only the parties involved were concerned with the transaction and the defendant was allowed to testify, and the Georgia Court,⁶⁴ in an action by a surviving wife, allowed the defendant to testify as the estate had no interest in the outcome. To like effect, but without supporting opinion, is the Missouri case of *Thomas v. Chicago, R. I. & P. R. Co.*⁶⁵

The annotator in a law report⁶⁶ clearly points out the distinction when suit is brought under the Wrongful Death Statute, saying:

"A statute excluding testimony as to transactions with, or statements of a deceased, in any action where judgment may be rendered for or against his administrator *does not apply* to a statutory action for wrongful death, brought by a widow of deceased in the name of the administrator, for the benefit of herself and infant child of the deceased . . . to exclude the testimony of the defendant as to circumstances of the killing of the deceased as the administrator is merely

⁶⁰16 Am. Jur., Death, § 344.

⁶¹*Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923 (1903).

⁶²*Overruling Sherlock v. Alling*, 44 Ind. 184 (1873).

⁶³60 Mo. 214 (1875).

⁶⁴*McEwen v. Springfield*, 64 Ga. 159 (1879).

⁶⁵271 S. W. 862 (Mo. 1925).

⁶⁶Annot., 1916 D L. R. A. 815.

a nominal party and the estate of the intestate has no interest whatsoever in the result of the suit, and no judgment can be rendered either for or against him which can affect the estate of his intestate." (Emphasis added).

And, in *American Jurisprudence*⁶⁷ the author said:

"On the question of the application of statutes governing the competency of a party as a witness in regard to transactions with a decedent to statutory actions for wrongful death there is some difference of opinion. Some courts take the view that actions for wrongful death brought by or for the benefit of the widow or next of kin of the decedent *are not within the terms of the general provisions governing competency of witnesses, and that, therefore, the defendant is not incompetent to testify in his own behalf.* In this connection, it has been pointed out that *so far as concerns statutes applicable to actions where one sues or defends as executor or legal representative of any deceased person, the estate has no interest in the result of the action, which is for the benefit of those named in the wrongful death statute, the personal representative, if he is the plaintiff, being merely a nominal party . . .*" (Emphasis added).

The Arkansas Court has held that an automobile collision resulting in an action by the administrator under the Wrongful Death Statute was not a "transaction" within the meaning of the Dead Man Statute so as to preclude the survivor-defendant from testifying.⁶⁸

In *Olson v. State Farm Mut. Auto Ins. Co.*,⁶⁹ the Court allowed the defendant to testify on the ground that the statute was not a "survival" statute so that the widow did not derive title through or under the deceased, and the Dead Man Statute did not apply.

In the case of *Wallace v. Stevens*,⁷⁰ an action was brought by a widow for the wrongful death of her husband. Over objections the court permitted the defendants to testify in their own behalf as to conduct and statements of the deceased before his death. On appeal, the plaintiff assigned this as error and alleged that the defendant should not have been permitted to testify under the provisions of a statute similar to Section 1690 which prevented testimony against a dead man's estate. The Court said:

" . . . The exceptions to the general rule laid down by the statute above quoted, do not, however, in terms or by implication, include the defendants to this action, so as to deny them the privilege of

⁶⁷58 Am. Jur., Witnesses, § 224.

⁶⁸102 S. W.2d 552 (Ark. 1937).

⁶⁹252 Wis. 37, 30 N. W.2d 196 (1947).

⁷⁰12 S. W. 283 (Texas 1889).

testifying. *This is not a suit by the heirs or legal representatives of J. H. Wallace, deceased. Plaintiff does not sue for any right inherited from deceased; for any compensation he would have been entitled to. Plaintiff sues only for compensation for what she and the children of deceased have lost by the death of the husband and father,—damages resulting to them which the law declares they are entitled to recover on account of their own loss. Deceased is not represented in this suit.* The widow and children merely represent themselves, and sue upon their own claim, allowed by law. We think there was no error in permitting defendants to testify as they did." (Emphasis added).

A parallel situation is the case of *Central Iron and Coal Co. v. Hamacher*,⁷¹ which was a suit brought under the provisions of the Alabama Employer's Liability Act. The employer's liability act of that state outlines specific beneficiaries under the Act who are entitled to sue for the death of an employee. In deciding that the estate of the employee had no interest in the result of the suit, and thereby that certain evidence was admissible, the Court said as follows:

"Under the very terms of the statute, the exception is confined to inhibiting the testimony where the transaction is with 'the deceased person whose estate is interested in the result of the suit.' The estate of W. F. Hamacher is not interested in this suit. Whatever property rights arose as the result of the injury causing the immediate death of W. F. Hamacher, they were never at anytime in W. F. Hamacher, and did not descend to to any legal representative of him. Whatever right of recovery may exist against the defendant is a right that did not arise until after his death. It could not have been a part of his estate, because it did not exist at any time during his life. The employer's liability act names classes of persons who could, under the contingencies named in the law, recover for his death. The concurrence of the law and of the fact of his death, under the circumstances mentioned in the statute, create rights in the persons named by the statute; but the deceased was not and could not be one of those persons. The recovery is not even for the benefit of creditors of the deceased. By the express terms of the statute, they are excluded."

The Alabama Court, in *Kuykendall v. Edmundson*,⁷² quoted from an earlier case⁷³ in holding the defendant-survivor could testify when sued by the Administrator, saying:

⁷¹248 F. 50 (5th Cir. 1918).

⁷²205 Ala. 265, 87 So. 882 (1921).

⁷³Hicks v. Barrett, 40 Ala. 291 (1863).

"Section 1938 of the Code does not, in our opinion, contemplate a suit by an administrator as the representative of an estate. It imposes upon the administrator a trust, separate and distinct from the administration. The trust is not for the benefit of the estate, but of the widow, children, or next of kin of the deceased. The administrator fills this trust, *but he does not do it in the capacity of representative of the estate. It is altogether distinct from the administration, notwithstanding it is filed by the administrator.* No judgment for costs, in a suit under that section, could properly be rendered, to be levied *de bonis intestatis*; and the court erred in rendering such a judgment against the administrator of Lankford's estate." (Emphasis added).

The Alabama Court has reaffirmed the *Edmundson* case on the same ground.⁷⁴

The Supreme Court of Washington has consistently construed both the Dead Man Statute and Wrongful Death Statute in the same manner as has the Mississippi Court. In a very well-reasoned opinion involving the question discussed herein, the Court said:⁷⁵

"A different question, however, is presented in connection with respondent's second cause of action, which is prosecuted pursuant to Rem. Rev. Stat. Sections 183, 183-1, *supra*. Actions brought under the foregoing statutes are strictly statutory actions, which may be prosecuted for the benefit of certain classes of persons therein named. In this case, the action is prosecuted for the benefit of the widow . . . *Under no circumstances does the estate of the deceased benefit by the action. Anything realized therefrom goes to the beneficiaries. A cause of action for wrongful death is not one which ever belonged to the decedent. The cause of action does not arise until his death, and is purely statutory.*

"'. . . It is true the death of her husband was an act precedent to her right of action; but so was the negligence of the plaintiff in error. The two united enacted the cause of action and gave it to the widow. It had no existence prior to that time. It originated between two living persons. Each is now a party to this action. The learned judge therefore erred in not permitting the plaintiff in error to testify, and the judgment must be reversed.'" (Emphasis added).

The Tennessee Court, in an action instituted by the widow as administratrix, but actually in her own behalf and in behalf of her chil-

⁷⁴*Atlantic Coast Line R. Co. v. Flowers*, 241 Ala. 446, 3 So.2d 21 (1941).

⁷⁵*Maciejczak v. Bartel*, 60 P.2d 31 (Wash. 1936).

dren under the Wrongful Death Statute, held that the defendant could testify as to the circumstances of the killing, saying:

"This testimony was held incompetent, because it is an action by the administrator of a deceased party, and the testimony offered was as to transactions with or statements of the intestate. It is true that by Section 3813d of the Code, evidence of such transaction or statement is made incompetent in all cases in which judgment may be rendered for or against the administrator. But while it is true that the administrator of Daniel Kearley is the plaintiff in this suit, it is also true that he is merely a nominal party, *and that the estate of his intestate has no interest whatever in the result of the suit, and that no judgment can be rendered either for or against him which can affect the estate of his intestate.*

"We do not think the statute was intended to exclude the testimony of a party situated as defendant Hale is in this case. We are, therefore, of the opinion that the court erred in excluding the evidence, and for this error the judgment is reversed." (Emphasis added).⁷⁶

As is true in most areas of the law, there are decisions to the contrary.⁷⁷

Most of the contrary views are based on differently worded statutes, although whether the various courts have used the "spirit and intentment" or "strict construction" rules has played its part. Although, as stated, the Mississippi Court has not ruled on the question, its language in *Mississippi Power Co. v. Archibald*,⁷⁸ is strikingly similar to reasoning of the courts holding that surviving defendants may testify in their own behalf, the Court saying:

"Section 510, *supra*, provides that damages for the wrongful injury and death of a married man shall be equally distributed to his wife and children, if he leaves such surviving him. The suit to recover such damages may be brought in the names of the personal representative for the benefit of the persons entitled under the law to recover, or by the widow for her own benefit, and on behalf of the children. *The personal representative is not a necessary party where*

⁷⁶Hale v. Kearly, 8 Baxt. (67 Tenn.) 49 (1874).

⁷⁷Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167 (1913); Souther v. Belleau, 203 Ky. 508, 262 S. W. 619 (1924); Abelein v. Porter, 45 App. Div. 307, 61 N. Y. Supp. 144 (1899), and other cases set out in Annotation in 36 A. L. R. 962 (1925); 41 A. L. R. 345 (1926); and 45 A. L. R. 1477 (1926). Cf.; Shaneybrook v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956), and see the excellent dissenting opinion in Thames v. State of Mississippi, 117 F. 2d 949 (5th Cir. 1941), 136 A. L. R. 926 (1941).

⁷⁸189 Miss. 332, 196 So. 760 (1940).

any of the persons entitled to recover under the law survive the deceased. He is not entitled, in behalf of the estate, to any part of the recovery, if any, that may be had. It is exempt in favor of the widow and children from the payment of any debts owing by the estate. He cannot administer on it as an asset so as to be entitled to commissions thereon as part of his compensation as an administrator. In other words, it is their right of action, and the law permits them, in their discretion, to sue either in his name or in their own to recover the damages accruing to them, and to them alone. In the case at bar he is purely a formal party, with no more interest in the litigation, so far as the estate is concerned, than a next friend would have. No title to damages recoverable for the wrongful death of a person ever vests in an administrator under said section 510, *supra*, by virtue of his appointment, where the deceased leaves surviving him those entitled under the law to recover the damages sustained. Unless asked to lend his name as nominal plaintiff, the suit is of no concern to him. Moreover, if his name is used, the estate is neither benefited by a recovery nor adversely affected by a failure to sustain the cause of action sued on. The real actors in this suit, under the statute here under consideration, are the resident widow and children of James V. Swearingen, deceased, on one side, and the non-resident defendant on the other. In no just or reasonable view of the law governing the jurisdiction of the Federal Court in such cases can the personal representative be deemed the *real party litigant* in a suit brought under the statute here involved, where both the cause of action, and any recovery had thereon, is for the sole benefit of the widow and children. The statute specifically says that the recoverable damages 'shall go to' the legal representative and be subject to debts only in the event there are none of the next of kin described in the statute entitled to recovery. Neither the damages to the decedent, nor to the widow and children in this case 'go to' the personal representative of the estate in any event. and he is clearly not the person under the facts in this case 'entitled under the law to recover.'"⁷⁹ (Emphasis added).

IV. CONCLUSION

Automobile accidents on over-crowded highways are among the leading causes of death in Mississippi. Often times the next of kin of the deceased are passengers in the same automobile and eye-witnesses to the accident. In any subsequent suit, under the holdings of the Supreme Court, these surviving witnesses are also the real parties in

⁷⁹Followed in *Montgomery & Atlantic Motor Freight Lines, Inc. v. Morris*, 193 Miss. 211, 7 So.2d 826 (1942), 8 So.2d 826 (1942).

interest whether the suit is brought in their own names or in the name of an administrator. If, under such circumstances, the Dead Man Statute is applied, the odd and obviously unfair result would be that the plaintiff "real parties" could give their version of the circumstances leading to the accident, while the surviving defendant would be led dumbly to the slaughter. Obviously there could be no "mutuality" in such a situation, and while no prediction of what the Court will do when the proper case is presented, to silence the defendant would not seem to be within the "spirit and intendment" of the statute, particularly in view of the court's pronouncement that the estate of the deceased has no interest whatever in a proceeding under the Wrongful Death Statute.

CRIMINAL CONVICTIONS AS EVIDENCE IN CIVIL PROCEEDINGS

Millard M. Bush, Jr.*

The rule supported by the weight of authority is that a judgment of conviction or acquittal rendered in a criminal prosecution cannot be received in evidence in a purely civil action.¹ Various reasons have been advanced for this rule of inadmissibility, including dissimilarity of object,² issues,³ procedure,⁴ lack of mutuality,⁵ and difference in degrees and elements of proof required.⁶ Further, it has been reasoned such evidence would run counter to both the hearsay⁷ and opinion⁸ rules as well as constitute highly prejudicial⁹ evidence against the convicted defendant in the eyes of the jury.

It is apparent that in today's world the "social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of rights of legal ownership."¹⁰ Word of a convicted murderer recovering benefits by the very act of which he was convicted would shock lawyer and layman alike. There is no question the maxim, *nullus commodum capere pro- test de injuria sua propria*¹¹ had its inception in the protection of the public by the judiciary.¹² These compelling conclusions demand an examination of this arbitrary rule of exclusion which in theory would permit a similar recovery.¹³ Surely a pragmatic approach is not beyond the inventive genius of the common law courts which must weigh competing ends to determine the greater good or the lesser evil.

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¹For a collection of recent decisions by jurisdiction denying admissions, see, Annot., 18 A. L. R. 2d 1290 (1950).

²State v. Broadnack, 69 Conn. 212, 37 Atl. 492, 494 (1897) (dicta as to effect of different objects and results).

³Young v. Copple, 52 Ill. App. 547 (1894) (different rules of decisions and course of proceeding).

⁴U. S. v. Donaldson - Schultz, Co., 148 Fed. 581 (4th Cir. 1906).

⁵Girard v. Vermont Mutual Fire Ins. Co., 103 Vt. 33, 154 Atl. 666 (1931).

⁶Interstate Dry Goods Stores v. Philip Williamson, 91 W. Va. 156, 112 S.E. 301 (1902).

⁷McCormick, Evidence § 295 (1954).

⁸Hinton, "Judgment of Conviction — Effect in a Civil Case as Res Judicata or as Evidence," 27 Ill. L. Rev. 195 (1932).

⁹Cammarano v. Gimino, 234 Ill. App. 145, 150 (1926).

¹⁰Cardozo, The Nature of the Judicial Process, at 43 (1921).

¹¹No one is able to take advantage of his own wrong.

¹²It has been said the problem did not arise under common law until comparatively recent years, "because of the ancient common law doctrine of attainder and corruption of blood." Wall v. Pfanschmidt, 265 Ill. 180, 160 N.E. at 786 (1914).

¹³This treatment is restricted to questions of admissibility in purely civil cases, and no attempt is made to include cases of a quasi-criminal nature, such as forfei-

I. HISTORICAL BACKGROUND

An examination of the historical background of this rule of exclusion is most interesting. The first group of cases were decided before 1843, for the Evidence Act passed by Parliament in that year removed many of the earlier disqualifications of witnesses on the ground of interest.¹⁴ This was an important act, for a number of these earlier cases raise as an objection to admissibility the possibility that the criminal conviction might have been obtained on the testimony of a person interested in the subsequent civil proceeding and reasoned that to admit such evidence would have indirectly violated the interest disqualification rule.¹⁵ In spite of the enlightened and practical approach made available to the British Courts in 1843, they continued to exclude such evidence on the maxim: *res inter alios acta*.¹⁶ Why this principal should exclude the evidence is a question left unanswered.

The cases up to the Evidence Act of 1843 generally deny the admissibility of the criminal conviction; but in *In Re Crippen*¹⁷ a conviction of murder was allowed in a subsequent probate proceeding as proof of the fact that Crippen had murdered his wife. The court referred to the pre-1843 authority as having been decided on "narrow and special grounds" of interest disqualification which had disappeared with the legislation of 1843 and subsequent acts. This decision was not received with favor by the British Courts and apparently the offered evidence remains inadmissible there.¹⁸

The passage of time has tended to eliminate many substantial distinctions between civil and criminal trials¹⁹ and a trend toward limited admission of such evidence in the United States as persuasive, but not conclusive, evidence is clearly discernible.²⁰ This new trend

tures, penalties, removal from office or disqualification for a profession. This work makes no attempt to include impeachment or special circumstances created by statute. It will be assumed throughout the paper that the criminal judgment in question is unassailable, that it is final, on the merits, with jurisdiction and neither fraudulent nor collusive.

¹⁴Morgan, Basic Problems of Evidence 82 (1954).

¹⁵Gibson v. McCarty, Cas. t. H. 312 (Eng.); R. v. Whiting, 1 Salk, 283 (Eng. 1795); Smith v. Rummens, 1 Campb. 9 (Eng. 1807); Bladmore v. Glamorganshire Canal Co., 2 C.M.&R. 133 (Eng. 1835).

¹⁶A thing done between others. *Brownsword v. Edwards*, 2 Ves. Sr. 243 (Eng. 1750); *Leyman v. Lattimer*, 37 Ex. Div. 352 (Eng. 1878); *Yates v. Kyffin - Taylor*, [1889] Weekly Notes 141 (Eng.). Since the person against whom it was sought to raise the conviction had ample opportunity to establish his defense before the criminal tribunal, can it be said that he suffers prejudice in violation of the maxim?

¹⁷[1911] Probate Division 108 (Eng.), followed in Canada in *Re Noble*, 1 W.W.-R. 938 (Sask).

¹⁸Cowen, "The Admissibility of Criminal Convictions in Subsequent Civil Proceedings," 40 Calif. L. Rev. 225 (1952).

¹⁹*Schindler v. Royal Ins. Co.*, 258 N.Y. 310, 179 N.E. 711 (1932).

²⁰For a collection of recent decisions by jurisdiction favoring admission, see Annot., 18 A. L. R. 2d 1299 (1950).

has generally met with the favor of the authorities on the subject.²¹ The rule of exclusion has been described by one as savoring of technicality.²²

II. ACQUITTAL EXCLUDED

There are stronger arguments for applying a different rule where, in a civil action, a prior *acquittal* is offered as proof of the facts upon which it is based, than in cases where evidence of a prior conviction is tendered. A judgment of conviction is a positive finding, indicating that the state has successfully borne the extraordinary burden of proving the relevant facts beyond a reasonable doubt, whereas the acquittal does not purport to be a judgment of innocence. It is merely a negative statement that the proof necessary for a conviction was not forthcoming. Probably because of this distinction there is no such trend in the acquittal cases toward the admission of the criminal judgment as is apparent in the cases involving prior convictions. The courts generally exclude evidence of the prior acquittal either in recognition of the above distinction²³ or in application of the general rule against admission of criminal judgments.²⁴ It is at least arguable, however, that this consideration should go to the weight rather than the admissibility of the evidence of acquittal, since the failure of the state to prove guilt to the required degree may have some tendency to show that the accused was not, in fact guilty.

III. MODERN RULE OF ADMISSIBILITY

The modern tendency seems to abandon any general rule excluding criminal judgments and approaches the problem from the point of view of the particular judgment offered. By this approach the rule as to the admissibility of a beneficiary's conviction for the murder of the insured in a civil action on the policy will probably differ from the rule as to the conviction for a traffic violation in a negligence action. A large number of courts continue to apply the rule excluding

²¹Jones, Evidence § 590 (4th ed. 1938); Phipson, Evidence 407, 420 (8th ed. 1942); 5 Wigmore, Evidence § 1346a (3rd ed. 1940); McCormick, Evidence § 295 (1954); Judson F. Falknor, "Evidence," 31 N.Y.U.L. Rev. at 788 (1956).

²²Phipson, op. cit. supra note 21 at 407.

²³Harper v. Balsi, 112 Colo. 518, 151 P.2d 760 (1944); Bray - Robinson Clothing Co. v. Higgins, 210 Ky. 432, 276 S.W. 129 (1925); Eagle Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927); Poston v. Home Ins. Co., 191 S.C. 314, 4 S.E.2d 261, 123 A.L.R. 1451 (1939); Tennessee Odin Ins. Co. v. Dickey, 190 Tenn. 96, 228 S.W.2d 73, 18 A.L.R.2d 1284 (1950).

²⁴Bobereski v. Ins. Co. of Pennsylvania, 105 Pa. Super. 585, 161 Atl. 412 (1932); Young v. Davis, 174 Miss. 435, 164 So. 586 (1935); New York Life Ins. Co. v. Murdaugh, 94 F.2d 104 (4th Cir. 1938); Hampton v. Westover, 137 Neb. 695, 291 N. W. 93 (1940); Feinstein v. Brooklyn Edison Co., 42 N.Y.S.2d 16 (1943); Hunter v. Gholson, 210 Miss. 28, 48 So.2d 603 (1950). But see Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S.W.2d 640, 130 A. L. R. 682 (1940); Williams v. Prather, 239 Ala. 524, 196 So. 118 (1940).

a previous conviction offered, in a civil action, as evidence of the facts upon which it was based. However, an increasing number of decisions have approved the admission of such evidence, reasoning that the safeguards afforded the accused under criminal procedure are greater than those in civil actions so that he has no cause for complaint that an adverse decision, arrived at under such restraints, should be used against him.

A. Virginia Rule

Virginia, taking the lead in this new approach, has admitted a previous conviction as conclusive evidence, giving to it the force of an estoppel. It may well be that even in Virginia this result will be reached only where the civil action is one in which the convicted criminal seeks to take advantage of a "right" arising from the crime itself, as where an arsonist endeavors to collect the insurance upon the burned property. The Virginia Court in *Eagle Star & British Dominions Ins. Co. v. Heller*,²⁵ faced the problem squarely and said:

"We confess our inability to perceive, however, why the accused person himself should not be held either as bound or affected by the result of the prosecution, if adverse to him. He has had his day in court, with the opportunity to produce his witnesses, to examine and cross examine the witnesses for the prosecution, and to appeal from the judgment. So that the chief reason for holding the Plaintiff in the civil case is not bound by the prosecution fails as to the Defendant, under conditions most favorable to himself—that is, in a prosecution in which he could not have been convicted unless the decisive fact, his guilt, had been shown beyond a reasonable doubt The rule of exclusion is a shield for the protection of those who have had no opportunity to assert their defense. To apply it here would be to convert it into a sword in the hands of one who has had such an opportunity, to be used by him for the effectuation of the same fraud which has been established, condemned, and punished in the criminal case. If there be a rule which cannot stand the test of reason, it is a bad rule."

B. New York Rule

Other jurisdictions have been unwilling to accept the conclusive rule of the Virginia court but have felt compelled to recognize the necessity for admitting previous convictions.²⁶ They have been satisfied

²⁵149 Va. 82, 140 S.E. 314 (1927); Note, 39 Va. L. Rev. 995 (1953); see also *Poston v. Home Ins. Co.*, 191 S.C. 314, 4 S.E.2d 261 (1939); *Austin v. U.S.*, 125 F.2d 816 (7th Cir. 1942); Note, 50 Yale L. J. 499 (1941).

²⁶The courts are agreed that convictions which are being appealed have no tendency to support the truth of the facts upon which they are based and are therefore inadmissible until final. *Pendleton v. Norfolk & W. R. Co.*, 82 W. Va. 270, 95 S. E. 941, 16 A. L. R. 761 (1918); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939); *Stinson v. Richardson*, 239 Ala. 161, 194 So. 508 (1940); *Marshak v. Long Beach*, 195 Misc. 125, 81 N.Y.S.2d 74 (1948).

in admitting the offered evidence as a circumstantial fact²⁷ or as *prima facie* evidence²⁸ which shifts the burden of proof to the plaintiff to prove his innocence.²⁹ Since the leading cases which have adopted this rule of admissibility have involved the situation where the criminal seeks to take advantage, by civil action, of his own wrong, there has been some tendency to regard the rule as limited to that state of facts. It is that situation where the convicted criminal attempts to reap the fruits of his own criminal acts where the courts have been particularly apt to abrogate or find an exception to the general rule excluding criminal convictions.

In a number of jurisdictions, while the general rule of exclusion is apparently still in force, there are decisions indicating some tendency in the other direction. Although conceding the Louisiana rule that evidence of a conviction or acquittal for the same occurrence giving rise to a civil action is inadmissible, the court in *Osborne v. Peoples Benevolent Industrial Life Ins. Co.*,³⁰ said that where the allegations and proof show that the party seeking damages in a civil action arising out of acts of a criminal nature was the *aggressor*, evidence of the conviction would be admitted to corroborate the contention that the plaintiff was engaged in committing acts in violation of the law at the time he was injured. In principle, it has been argued that the distinction between aggressive and defensive use of a conviction is highly dubious, when the real question cannot vary according to the use to which it is put.³¹ The vital issue is whether the probative value of the conviction outweighs the danger of undue prejudice.

IV. THEORETICAL ARGUMENTS

Probably the most serious objection to admitting a previous conviction was advanced by Professor Hinton:³²

"When we admit evidence to a jury we assume that their general knowledge and experience will enable them to determine roughly at least its probative force—in the metaphor of the courts, to weigh it and balance it against other evidence. We may be skeptical as

²⁷*Wolff v. Employers Fire Ins. Co.*, 282 Ky. 824, 140 S.W.2d 640, 130 A.L.R. 682 (1940); *New York & C. Mail S.S. Co. v. Continental Ins. Co.*, 32 F. Supp. 251 (S.D.N.Y. 1940); *Austin v. U. S.*, 125 F.2d 816 (7th Cir. 1942).

²⁸*Schindler v. Royal Ins. Co.*, 258 N.Y. 310, 179 N.E. 711 (1932); *Fidelity - Phoenix Fire Ins. Co. of N.Y. v. Murphy*, 226 Ala. 226, 146 So. 387 (1933); *Sovereign Camp, Woodmen of the World v. Gunn*, 229 Ala. 508, 158 So. 192 (1934). See also *In Re Ulmer*, 268 Mass. 373, 167 N.E. 749 (1929); *True v. Citizens' Fund Mutual Fire Ins. Co.*, 187 Minn. 637, 246 N.W. 474 (1933).

²⁹*Fidelity - Phoenix Fire Ins. Co. v. Murphy*, 231 Ala. 680, 166 So. 604 (1936), cert. denied 299 U.S. 577 (1936); *North River Ins. Co. of the City of New York v. Militello*, 100 Colo. 343, 67 P.2d 625 (1937).

³⁰19 La. App. 667, 139 So. 733 (1932).

³¹*Cowen*, supra note 18.

³²Hinton, supra note 8, at 198.

to whether they really attempt it in the majority of cases. We may suspect that most verdicts represent a "hunch" or a compromise in which logic and experience played a minor role. But, if we give the jury as an impossible task, the case might as well be decided by the toss of a coin. Manifestly, there is no way in a given case of determining the probative value of a conviction to establish the truth of the propositions on which it was based. If there were no other evidence, we might indulge in the presumption and so settle the matter. But if there is other evidence on the questions, what effect should be given to the fact that another jury on an unknown state of evidence arrived at a given conclusion. The present jury, if it really considers the matter, must either blindly accept the conclusion of the first jury or ignore it because there is no rational alternative."

The objection that the previous conviction is only the opinion of the jury which may act highly prejudicial to the convicted defendant is thus advanced. Wigmore sharply disagrees, and states that the considerations which may justify the opinion rule in some cases have no application here.³³ He further sees a general repudiation or distrust of the value of the jury's verdict by Professor Hinton. This objection has been examined by Dean Wright³⁴ who points to the fact that the opinion rule has itself been the subject of much criticism, and, what is more important, is subject to very many statutory and common law exceptions. His pungent comment on the application of the opinion rule to this case is concise and to the point:

"To state that a civilized community is willing to see a man hanged on such a finding of fact but to treat such a finding as a mere opinion in a subsequent case involving a matter of dollars and cents is a reflection on the administration of justice as well as an offence to common sense."

The argument based upon the hearsay rule may be dealt with briefly. The admissibility of a criminal conviction has been characterized by a recent commentator as a "flagrant violation of the hearsay rule."³⁵ This ignores the point made by Wigmore that evidence of many inquisitions and official reports is already authorized and it is difficult to see why the determinations of criminal courts should be treated differently.³⁶ As has been mentioned previously, some courts

³³Wigmore, *op. cit. supra* note 21.

³⁴Wright, "Evidence - Admissibility of Criminal Convictions in Civil Action," 21 *Can. B. Rev.* at 658 (1943).

³⁵Kiefer and Crowley, "Effect of Prior Criminal Conviction in Subsequent Civil Action," 2 *Syracuse L. Rev.* at 111 (1950).

³⁶Wigmore, *op. cit. supra* note 21.

³⁷Tucker v. Tucker, 101 N.J. Eq. 72, 137 Atl. 404 (1927); Wald v. Wald, 161 Md. 493, 159 Atl. 97 (1931); O'Toole v. O'Toole, 42 Times L.R. 245 (Eng. 1926).

³⁸Sovereign Camp, Woodmen of the World v. Gunn, 227 Ala. 400, 150 So. 491 (1933), wherein the court allowed evidence of the conviction as "*prima facie* evidence" of guilt.

have been bothered over the problem of mutuality. Since the state, which was a party to a criminal action for adultery, is also an interested party in actions involving divorce or other domestic relations situations, there may be arguments for admitting such evidence as a special situation or as an application of the general rule of admissibility.³⁷ One court agreed that a criminal conviction was not *res judicata* in a subsequent civil action because of the failure of mutuality of parties, but added that because of this many courts not adequately considering the rule of relevant evidence and sound public policy had denied the admissibility of such evidence entirely.³⁸ Another court cited the convicted party's attempt to have the issue retried in a civil proceeding after solemn adverse adjudication and flatly stated: "the requirement of mutuality must yield to public policy."³⁹

In considering the stock arguments against admitting previous convictions in civil suits, Judge Pound had no trouble in distinguishing them to allow admission as *prima facie* evidence of guilt. He said:⁴⁰

"[But] as the lapse of time has tended to dissolve many substantial distinctions between civil and criminal trials, these reasons have become weak and outdated, unless we fall back on the doctrine of mutuality of estoppel which requires that no party to a legal proceeding should be bound by a prior judgment unless the party seeking the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way While a judgment of acquittal is only a determination that guilt has not been established beyond a reasonable doubt, although a preponderance of evidence might point thereto, a valid judgment of conviction in a court of competent jurisdiction with all the safeguards thrown about a person accused of a crime which would enable him to make his defense, to examine witnesses and to testify in his own behalf, might be held free from collateral attack without exposing the law to the jibes and jests of the critics of our present system of administering justice."

A. Traffic Convictions Excluded

The logical basis for admitting evidence of convictions seems to be the same regardless of the type of conviction or civil action involved although the strong public policy rule against permitting one to profit by his own wrong may furnish a more compelling reason for abandoning the previous rule. It may, however, be reasonably argued that the rule of exclusion should be continued as to convictions for minor traffic violations and other similar offenses, where the safeguards afforded the accused may be more or less perfunctory, and a moderate fine may be accepted as a matter of convenience. Such convictions may be given

³⁹Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260 (1934).

⁴⁰Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. at 712 (1932).

undue weight in civil actions involving large sums of money. However, in a number of cases excluding traffic convictions, the courts have not generally made this distinction, but have relied upon the traditional reasoning for exclusion.⁴¹ Indeed, the New York Court approached this question in a novel manner by holding that a conviction for reckless driving should be excluded under the general rule since it did not satisfy the New York doctrine admitting convictions as *prima facie* evidence on the theory that the court will not allow the wrongdoer to profit by his own illegal act.⁴² Statutes in some jurisdictions provide that traffic convictions shall not be admissible as evidence in civil actions, and such a statute has been held to exclude evidence of a plea of guilty to traffic violations.⁴³

B. Guilty Plea Admitted

In the absence of a statute providing otherwise, the courts appear to be agreed that a plea of guilty is admissible, where otherwise relevant, in a civil action, since a guilty plea constitutes a declaration against interest⁴⁴ or judicial admission of the truth of the charges.⁴⁵ Such a plea is, however, not conclusive but may be explained,⁴⁶ and is ordinarily allowed to affect only the interest of the person making the plea, although the results of the cases are not in accord on this point.⁴⁷ The problem of admitting pleas to traffic charges is particularly perplexing and there have been sharp differences on this question. Guilty pleas have been admitted⁴⁸ and excluded⁴⁹ where the defendant had acknowledged his guilt in the "criminal" court either by statement or deed, such as paying a fine and costs.

⁴¹Quatray v. Wicker, 16 La. App. 515, 134 So. 313 (1931); Generatl Exchange Ins. Corp. v. Sherby, 165 Md. 1, 165 Atl. 809 (1933); Pollard v. Harbin, 56 Ga. App. 172, 192 S.E. 234 (1937); Day v. Gold Star Dairy, 307 Mich. 383, 12 N.W.2d (1943); Padgett v. Williams, 82 Ga. App. 509, 61 S.E.2d 676 (1950).

⁴²Roach v. Yonkers R.R. Co., 242 App. Div. 195, 271 N.Y.S. 289 (1934).

⁴³Walther v. News Syndicate Co., 276 App. Div. 169, 93 N.Y.S.2d 537 (1949), Noted in 50 Col. L. Rev. 529 (1950); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943).

⁴⁴The courts, with almost unanimity, use the phrase "declaration against interest" although it is used here with reservation.

⁴⁵Motley v. Page, 250 Ala. 265, 34 So.2d 201 (1948). It may be well to bear in mind that the evidentiary fact admitted is the plea of guilty rather than the fact of conviction.

⁴⁶Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3N.E.2d 17 (1936); Race v. Chappell, 304 Ky. 788, 202 S.W.2d 626 (1947).

⁴⁷Effect of guilty pleas binding third parties is not within the scope of this work. See, Annot., 18 A.L.R. 2d 1312 (1950), for recent decisions for and against allowing such pleas for the jury's consideration.

⁴⁸Olk v. Marquardt, 203 Wis. 479, 234 N.W. 723 (1931); Weiss v. Wasserman, 91 N.H. 164, 15 Atl.2d 861 (1940); Kock v. Elkins, 71 Ida. 50, 225 P.2d 457 (1950).

⁴⁹Zenuck v. Johnson, 114 Conn. 383, 158 Atl. 910 (1932); Sothern v. Vandyke, 114 N.J.L. 1, 174 Arl. 877 (1934); Sherwood v. Murray, 233 S.W.2d 879 (Tex. Civ. App. 1950).

C. *Nolo Contendere Excluded*

Since the plea of *nolo contendere*,⁵⁰ while admitting guilt for the purpose of the action in which it is entered, restricts its effect to that action, it has been held that a *conviction*⁵¹ based upon such a plea is admissible in a civil action as evidence of the facts admitted by the plea. This would appear to be a correct analysis of the problem in line with the theory of the thinking courts which exclude convictions as smacking of compromise and expedience rather than verity. *A fortiori*, the plea itself should be inadmissible.⁵²

V. LEGISLATION — A SOLUTION?

Frequently, the courts adhering to the majority rule of exclusion recognize the practical value of the different and suggest that it might be accomplished by legislative enactment. Probably there would be no serious objection to a statute admitting conviction against the convicted person, and those deriving rights through him, since he would have had his day in court. But Professor Hinton doubts whether such a statute would not violate the due process clause if applied to controversies between strangers.⁵³ The Act of Congress of March 31, 1875,⁵⁴ undertook to make a conviction of larceny conclusive in the prosecution of another person for receiving stolen property. In a case⁵⁵ prosecuted under this statute the trial court instructed that the conviction of the alleged thief was *prima facie* evidence of the larceny as against the receiver, but the Supreme Court held that this violated the defendant's right to be confronted with the witness to prove one of the essential elements of the crime charged against him. While the due process clause was not involved, the case is at least indicative of the limitations on the power of the legislature to make a judgment of conviction binding on third persons.

VI. CONCLUSION

It is apparent that this topic has been the subject of exhaustive research by legal scholars in an effort to arrive at a rational approach.

⁵⁰See, generally, Annot., 152 A.L.R. 253 (1944).

⁵¹*Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939); *Krowka v. Colt Patent Fire Arms Mfg. Co.*, 125 Conn. 705, 8 A.2d 5 (1939); *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 308 (E. D. Wis. 1940).

⁵²*Wright v. Wright*, 98 N.J.Eq. 528, 131 Atl. 94 (1925); *Fidelity - Phoenix Fire Ins. Co. v. Murphy*, 231 Ala. 680, 166 So. 604 (1936).

⁵³Hinton, *supra* note 8, at 197. Suppose, for illustration, that "X" should be convicted of the murder of "Y" who was insured against accidental death. Could the insurance company be foreclosed from a defense that it was really a case of suicide? In such a case the defendant insurance company has never had its day in court.

⁵⁴18 Stat. at Large 479 (1875).

⁵⁵*Kirby v. U.S.*, 174 U.S. 47 (1899).

The growing minority of courts, becoming discontented with the arbitrary rule, have insisted that common sense and consistency of adjudication require that a judgment of conviction involving the same issues be admitted as evidence in a subsequent civil action. This view was embodied in the Model Code,⁵⁶ and has been sanctioned by the Uniform Rules⁵⁷ with the important limitations to convictions of a felony. It would appear that the latter approach, which excludes traffic convictions, would be more acceptable in the light of everyday experience.⁵⁸ As a practical matter, the judgment of conviction of a felony is of high probative value and should not be excluded. If the bench were to decide to modernize the present strict standard of exclusion, with its inevitable repetitious proceedings and occasional injustice, a theoretical ground for the revision is, as Dr. Goodhart has pointed out, ready at hand: it is *omnia praesumuntur rite esse acta*.⁵⁹

While a high degree of certainty as to the statement of a rule of evidence is desirable, justice must not be sacrificed for certainty and due weight should be accorded probability. Rules are merely the attempts at obtaining the ultimate, the dispensing of justice; they are not in themselves the ultimate.⁶⁰ As Mr. Justice Cardozo so ably commented:⁶¹

"The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes."

⁵⁶Model Code of Evidence, rule 521 (1942).

⁵⁷Uniform Rules of Evidence, rule 63 (20) (1953). Pertinent comment concerning the Rule: "... Where a person has had an opportunity to defend himself and has entered a plea of *nolo contendere* or a plea of guilty or has been found guilty beyond a reasonable doubt, the judgment entered on the plea or verdict would seem to have sufficient value to be worth consideration by the trier of fact, and necessarily include a finding of all facts essential to sustain the judgment in the case in which rendered..." (Emphasis supplied).

⁵⁸As a result of different standards of evidence which might exist between the judicial systems of the several United States, would any difficulty be experienced in admitting a judgment of conviction obtained in New Jersey in a subsequent civil proceeding in Arizona? Assume it would be admissible in both states, or that the Uniform Rules had been adopted by both states. Probably the full faith and credit clause of the U.S. Constitution would demand admission. Cf. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Roche v. McDonald*, 275 U.S. 449 (1928).

⁵⁹All things are presumed to have been done rightly. Dean A. L. Goodhart, Note, *O'Toole v. O'Toole* (42 Times L.R. 245, Eng. 1926), 42 L.Q.Rev. at 145 (1926).

⁶⁰Rucker, "The Twilight Zone of Hearsay," 9 Vand. L. Rev. at 459 (1956).

⁶¹Cardozo, *The Nature of the Judicial Process*, at 40 (1921).

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF MISSISSIPPI

*Lester C. Franklin, Jr.**

The Public Employees Retirement System of Mississippi, established by Chapter 299, Laws of 1952,¹ and consisting of two parts, Social Security under Article I,² and the State Retirement Annuity under Article II,³ may be represented figuratively as a pair of scales.

In such a pair of balances, Social Security,⁴ on the one hand, places a disproportionate weight upon obtaining current coverage by being engaged in covered employment for six quarters or eighteen months, while State Retirement under Article II, hereinafter called the State Retirement Plan, places greater weight upon length of service, especially favoring those employees who were working under covered employment on or prior to July 1, 1953, having prior years of service to which their current and future years of service can be added.⁵

Social Security allows the greatest rate of retirement benefits upon the first average monthly \$110 of earnings, at 55%, allowing benefits of 20% on earnings after the first \$110 up to \$350 average monthly earnings, while the State Retirement Plan discards the first \$100 of average monthly earnings before computing retirement benefits for length of service.⁶

In computing monthly benefits, Social Security divides monthly earnings of a member by the total number of months elapsing between a date specified by the Social Security Act until he is eligible for retirement thereunder. There is a modification of this rule in certain cases, allowing the deduction of not more than five years of the lowest earnings and, in the case of disability, allowing the deduction of all years in which there are no or low earnings. On the other hand, the State Retirement Plan considers the five highest years of salary as well as the number of years elapsing since the employee commenced work under covered employment until he becomes eligible for retirement.⁷ The State Retirement Plan likewise allows benefits for disability in that

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¹Miss. Code Ann. §§ 7446-01 to -29 (1942).

²Miss. Code Ann. §§ 7446-01 to 7446-10 as amended Miss. Laws 1956, c. 346.

³Miss. Code Ann. §§ 7446-11 to 7446-29 as amended by Miss. Laws 1954, c. 308 and Miss. Laws 1956, c. 347.

⁴Old Age and Survivors Insurance provisions of the Federal Social Security Act, as amended.

⁵Miss. Code Ann. § 7446-14 (1942).

⁶Miss. Code Ann. §§ 7446-12 and 7446-21 (1942).

⁷Miss. Code Ann. §§ 7446-12 and 7446-14 (1942).

after a person has been in covered employment for ten years,⁸ he is, upon permanent disability, eligible for disability retirement as long as he remains so disabled. Thus, the State Retirement Plan balances, supplements and complements Social Security, as Old Age and Survivors Insurance is generally known, and the plan reaches its maximum effectiveness in the case of coverage by both Social Security and State Retirement.

I. BACKGROUND

Mississippi was in a position to be the next state after Virginia to take advantage of an amendment to the Federal Social Security Act in 1950 which permitted a state to cover its employees and local governmental employees under Social Security, provided the state did not already have said employees covered by another retirement system. The only retirement system which Mississippi had on a state level was Teachers Retirement,⁹ which provided inadequate retirement benefits to its members and called for heavy appropriations from the state legislature every biennium. The federal law required repeal of the former Teachers Retirement Act before teachers could be eligible for inclusion as a coverage group under Social Security.

Effective July 1, 1952, the Teachers Retirement Act was repealed,¹⁰ but the repealing act guaranteed current teacher retirants the continuation of benefits to which they were entitled.

A Federal-State Agreement between the State of Mississippi and the Federal Security Administrator was signed on July 2, 1952, thereby inaugurating coverage of state employees, including teachers as state employees, under Social Security, as well as the employees of those counties, municipalities, school districts, levee districts, municipal light, water and gas commissions, community hospitals, libraries and other political subdivisions, instrumentalities and so-called juristic entities which saw fit to execute agreements allowing coverage under Social Security and obligating themselves to collect employers' and employees' contributions due thereunder as well as to make periodical salary reports substantiating such payments. These agreements were executed between the State Retirement Office and the local governmental subdivisions and later approved by the Social Security Administration as modifications of the Federal-State Agreement. Today there are approximately 60,000 such public employees covered under Social Security.

While such State-Local Agreements were being executed, a majority of the localities likewise executed the second part of the agreement,

⁸Miss. Code Ann. § 7446-16 (1942).

⁹Miss. Laws 1944, c. 161.

¹⁰Miss. Laws 1952, c. 302.

whereby they obtained coverage under the State Retirement Plan, until today there are approximately 40,000 employees covered under Article II of the retirement system.

As it is authorized to do, the board of trustees of the system has invested approximately \$20,000,000 of reserves in eligible bonds and securities on which earnings have averaged at least 3% per annum. The system is actuarially funded,¹¹ necessitating only an \$85,000 biennial appropriation, more or less, to defray administrative expenses.¹² It receives a certain percentage of collections of contributions from the local governmental subdivisions under Article II with which to help defray administrative expense,¹³ which have been reduced from 5% then to 4% and now to 3% of such collections.

II. ACTUARIAL FUNDING

An actuarially funded retirement system has been described as a pipe or conduit. You can't get more water out of one end than you put in the other. Every effort has been made to put as much water in one end as will be needed to come out the other end, based on the best available information. This information includes mortality tables and experience as to longevity of members of the State Retirement Plan, and the earnings and prospective earnings of the system, and is weighed in order to insure that collections and reserves will be at least the equivalent of those demands which will be placed upon it in the form of retirement benefits and annuities which can be reasonably expected in the light of experience as to withdrawals from service, retirement of members and deaths.¹⁴ The system has an actuary, who is a specialist in insurance and retirement annuity matters. The system calls for the constant services of its actuary and periodic, complete actuarial surveys to guarantee its financial soundness.¹⁵

The administration of the system is under the supervision of a Board of Trustees which consists of ten members, four of whom are ex officio members. The Attorney General advises the Board, and there is a Medical Board, consisting of three physicians, not eligible to participate in the retirement system, who pass on disability retirants.¹⁶

III. BENEFITS

There are many features of this dual retirement system which

¹¹Miss. Code Ann. §§ 7446-12 to -13 and 7446-20 to 21 (1942).

¹²Miss. Laws 1956, c. 123.

¹³Miss. Code Ann. § 7446-13 (1942).

¹⁴See note 13 *supra*.

¹⁵Miss. Code Ann. §7446-19 (1942).

¹⁶See note 15 *supra*.

could be discussed in detail, if the limits of this article permitted it, such as the requirements under both Social Security and State Retirement for membership coverage, obtaining benefits, payment of contributions by both the employer and employee, service or longevity retirement, retirement for disability, survivorship benefits, and the effect of withdrawal from service before attaining retirement age. There are also many problems which are peculiar to Article II, such as compulsory retirement upon the attainment of a certain age after July 1, 1958; the right to re-employment after retirement; the constitutionality of the State Retirement System; and cases in this state, which would omit the discussion of classification of various subdivisions and instrumentalities of government recognized under both parts of the plan.

A. Social Security Benefits

Under Social Security there are two types of benefits, those to the worker himself or to him and his wife, called retirement benefits, and those to his survivors, such as his widow and children under 18 years of age. The following sample from a table will be illustrative:

Av. Monthly Earnings	Worker's Mo. Benefit	Worker & Wife	Widow, or Child, etc.	Widow & 1 Child	Widow & 2 Children
\$ 45.00	\$ 30.00	\$ 45.00	\$30.00	\$ 45.00	\$ 50.20
100.00	55.00	82.50	41.30	82.60	82.60
200.00	78.50	117.80	58.90	117.80	157.10
300.00	98.50	147.80	73.90	147.80	197.10
350.00	108.50	162.50	81.40	162.80	200.00

Two major changes in the Social Security Act were made by Congress in 1956. One of these changes provided that working women and dependent wives of retired husbands could retire at as low an age as 62 with some reduction in their benefits. It further provided full benefits for widows at 62 instead of requiring them to be age 65.¹⁷

The other major change in Social Security was the providing of a monthly retirement payment to persons who qualified for total and permanent disability benefits, providing the same benefits as if the person were 65, but beginning such payments upon his attaining age 50; and if, for instance, he became permanently and totally disabled at 40, his earnings would be frozen at that age without dividing by the

¹⁷Public Employees Retirement System Biennial Report (1955-1957), p. 4.

intervening months until he became eligible for disability payments at age 50.¹⁸

Any man, who is age 65 or over, or woman who is age 62 or over, regardless of whether or not they are employed, should check with the nearest Social Security district office on the subject of his eligibility for Social Security benefits. This especially applies to seasonal workers or school teachers not actively employed in the vacation months.¹⁹

If the employee becomes eligible for benefits after August, 1954, as many as four years of his lowest income can be omitted. If the employee has at least 20 quarters (five years) of covered work, up to five years can be omitted. After the drop-out years, the average monthly earnings can be calculated by dividing the total earnings in the remaining periods by the number of months in the periods; however, not less than eighteen months can be used.

Beginning January 1, 1955, an employee who was totally disabled and whose disability was expected to continue indefinitely, *could apply to have his earnings record frozen*. When the earnings record is frozen a period of no earnings or low earnings need not be counted in figuring the employee's average earnings. This makes it easier for the employee to qualify for benefits and it increases the amount of benefits obtainable. There is a clear implication of the necessity to make timely application for the freezing of a disabled person's record. It has been the writer's observation that Social Security aids the vigilant and that various limitation periods may reduce his benefits unless a person makes timely application therefor.

A person may become eligible to receive monthly disability benefit payments after June, 1957, provided (a) he is age 50 or over, (b) the disability is so severe that the person is unable to do any substantial work, (c) the person has been disabled for at least 6 months and the disability is expected to continue indefinitely, (d) the person worked at least 5 years under Social Security coverage in the 10 years before the beginning date of the disability and at least 1 1-2 years must have been within the 3 years prior to the beginning date of the disability.²⁰

B. State Retirement Benefits

Under the State Retirement Plan, benefits are figured at the rate of 1 1-4 per cent times the average yearly earnings for the highest consecutive five years, deducting \$1,200 from such average annual earnings, multiplied by the number of years service to the person's credit. The first \$1,200 of salary is deducted because a person does not pay em-

¹⁸See note 17 *supra*.

¹⁹Pamphlet published by P.E.R.S., December 1, 1956, "Membership, Cost, and Benefits of Social Security & State Retirement Annuity," p. 3.

²⁰See note 19 *supra*.

ployees' contributions on that amount; and, as earlier stated. Social Security pays maximum benefits upon that portion of one's earnings. This is further reduced by 3 per cent for each year under age 65 at which a person retires.

For example, suppose a person makes an average annual salary of \$6,000 under covered employment and works for 20 years. This would be \$500.00 per month, which, less \$100, would be \$400 per month, 1 1-4 per cent of which would be \$5 per month for 20 years, giving a monthly retirement benefit under Article II of \$100. The present rule of thumb is a rate of \$5 per month benefits for each year of service in the highest bracket which the laws presently recognize, that is, \$6,000 per year. Senate Bill No. 1750 is now pending in the 1958 Regular Session of the Legislature to raise this amount to \$9,000, which, less \$1,200 would give \$7,800 or \$650 per month, 1 1-4 per cent of which would give approximately \$8 per month benefits for each year of service, increasing the monthly benefit from \$100 to \$160 in the above example of 20 years of service. The bill would further provide that the minimum monthly benefit for any retirant under the State Retirement Plan would be \$10.²¹

The State Retirement Disability Annuity is a more difficult factor, for there enough employer's contributions are set aside to a disability retirant's account to equal the amount which would have been paid by the State or local governmental subdivision if he had continued in employment until he became 60 years of age. No person becoming permanently disabled after age 60 is eligible for disability retirement under the State Retirement Annuity Plan. However, he is granted the additional benefit of not making any discard of the first \$1,200 of salary or earnings in computing his average annual earnings for the highest consecutive or joined five years of earnings. The formula is: (1 1-4 per cent) times (at least 10 years of service, which he must have before the disability occurs, plus those years that would have been obtained up to age 60) times (his average annual salary for the five highest consecutive years, including the first \$1,200, not to exceed \$6,000 any fiscal year) times (85 per cent) times (75 per cent).

IV. CONTRIBUTIONS

Contributions under Social Security at the present rate are 2 1-4 per cent of earnings up to \$350 per month, or \$4,200 per calendar year, to be paid by the employer and a like 2 1-4 per cent to be paid by the employee; 2 3-4 per cent each for 1960-1964; 3 1-4 per cent each for 1965-1969; 3 3-4 per cent each for 1970-1974; and 4 1-4 per cent each

²¹Miss. Code Ann. § 7446-15 (1942).

²²Miss. Code Ann. § 7446-16 (1942).

for 1975 and subsequent years under present federal law.²³

Contributions under the State Retirement Plan are 2 1-2 per cent of salary up to \$6,000 per year to be paid by the employer and 4 per cent of salary up to \$6,000 per year, less \$1,200, to be paid by the employee.²⁴ Thus, the maximum salary against which contributions are made is \$4,800 for the members and \$6,000 for the employers. A comparison of the percentage return in retirement benefits as compared to earnings will show that this percentage is highest in the low salary brackets and reduces in the highest salary brackets, but that by combining the two Articles of this act, there is more of a leveling off of percentage return in comparison with salary bracket than is true in the case of Social Security alone. This balance is the best justification for Mississippi's dual system of retirement, and represents one of the best returns against investment of any retirement system in the nation. This is possible because Mississippi was in position to take full advantage of Social Security benefits.

V. HISTORY OF RETIRANTS

From the latest available figures, as of July 1, 1957, the average salary of the active retirants was \$221.18 per month and their average estimated total monthly retirement benefit was \$117.22 per month or an average of 56.13 per cent of retirement benefits compared to salary. The active retirants average 66.3 years of age at retirement and average 28.48 years of creditable service at the time of retirement. Several hundred additional retirants have retired under Social Security alone, as quite a number of retirants were not eligible for the State Retirement Annuity supplement because of their limited period of service, or wages, or because their political subdivisions did not elect to join both parts of the Retirement System.

VI. NECESSITY OF RETIREMENT TO DRAW BENEFITS UNDER ARTICLE II

A point of utmost importance and in the best interest of the estates of employees covered under Article II is to bear in mind that unless they retire and exercise an option under the terms of which their widow or widower, as the case may be, may receive an annuity for life, the only claim which their estate may have against the System will be one for a return of employees' contributions paid into the System plus interest earned thereon.²⁶ It is obvious that a person cannot be deceased and individually eligible for retirement benefits. In one ex-

²³See note 19 *supra* at 2.

²⁴Miss. Code Ann. § 7446-21 (1942).

²⁵Public Employees Retirement System Biennial Report (1955-1957), p. 8.

²⁶Miss. Code Ann. §§ 7446-15 and 7446-18 (1942).

ample, the difference between such contributions and the value of the annuity was the difference between \$1,000 and \$20,000. Under the terms of this act, only the retirant can exercise an option favorable to his subsequent widow and he can not do so unless and until he makes formal application for retirement *when he retires*. Another example comes to mind in which a member died suddenly and his widow was not eligible for an annuity. She received only the return of contributions paid by him with interest.²⁷

There is an exception to this, however, by amendment to the original act, under the terms of which a covered employee who has completed 20 years of service, who dies after January 1, 1953, leaving a widow at least 45 years old, will have Option 2 exercised by law in her behalf, until she becomes eligible for Social Security benefits at age 62. Option 2 provides an annuity in reduced amount which is computed on the basis of the longevity of both the husband and wife, rather than on his longevity alone.²⁸ Naturally, it is reduced in amount because of the longer period it must run in accordance with the mortality tables in use by the System.

A. *Compulsory Retirement*

The provisions of law applicable to compulsory retirement for age and length of service, as contained in Section 15 (e) of the Act, as amended by Chapter 347, Laws of 1956, are as follows:

"Effective beginning July 1, 1958, except as herein otherwise specifically provided, any member of either Article I or Article II of this Act in service who shall have attained the age of sixty-five (65) years shall be retired forthwith, if such member shall then have completed at least fifteen (15) years of creditable service, but if such member shall not have completed at least fifteen (15) years of creditable service, retirement of the member shall occur upon attainment of age seventy (70) years, whichever event shall first occur. In any case in which the employer certifies that the continuance in service of a member who shall have attained an age of sixty-five (65) years or over would be advantageous to the State Service by reason of his expert knowledge and qualifications, and upon written application of the member and his employer, the Board may authorize the continuance in service of such member beyond such age for periods of one year until the age of seventy (70) years is attained, at which time retirement shall be mandatory."

Thus, it appears that July 1, 1958, is the date for mandatory retirement of those members who have attained 70 years of age and of those members who have attained 65 years of age, provided they have 15 years of creditable service and provided further, that the employer

²⁷Ibid.

²⁸Miss. Code Ann. § 7446-15 (1942).

fails to certify that the continuance in service of the member would be advantageous to the State Service by reason of his expert knowledge and qualifications, upon written application of the member and his employer and authorization by the Board of Trustees to continue the member in service beyond such age of 65 for periods of one year until the age of 70 years is attained.

B. Prohibition Against A Retired Member's Return To State Service

Section 22 of said Act provides as follows:

"No person who is being paid a retirement allowance, or a pension, after retirement under any laws of this State, or under any ordinance or resolution of any municipal corporation, public board or commission of the State, or under any law of the United States, shall be employed or paid for any service by the State of Mississippi. This section shall not apply to any person employed as attorney on a fee basis, nor to any war veteran by virtue of the fact that he is receiving compensation for disability or retirement pay from any State or Federal agency, nor to any widow, child or dependent of any war veteran who, due to the military service of such veteran, is receiving compensation, pension or benefits of any kind from any State or Federal agency, nor to any pensioner who has been elected to public office after retirement, nor to any person employed because of special knowledge or experience."

The construction of the said section was involved in *Board of Trustees of Public Employees Retirement System v. Lowry*,²⁹ which held that the Board of Trustees was within its rights in denying membership to a certain employee of a State agency. The Court refused to find that the appellee came within the exception mentioned in Section 22, which excludes from the operation of that section "any person employed because of special knowledge or experience." The Court made the distinction that though a person may have special knowledge and experience, if the particular job or position does not require the use of such special knowledge or experience and could be filled by a person of lesser attainments then the Board of Trustees would be justified in denying membership in the System on the ground that the conditions of the exception had not been met.

VII. CONSTITUTIONALITY

The writer doubts seriously that the question of the constitutionality of this act could be successfully raised. Section 93 of the Mississippi Constitution of 1890 provides: "The Legislature shall not retire any officer on pay, or part pay, or make any grant to such retired officer." The only case cited thereunder is *Vicksburg v. Crichlow*,³⁰ which held

²⁹88 So.2d 585 (Miss. 1956).

³⁰196 Miss. 259, 16 So.2d 749 (1944).

that the retirement benefits provided under the Firemen's and Policemen's Disability and Relief Act are not "gratuities" nor "for a private purpose," nor the "lending of credit," nor are they "extra compensation" within constitutional provisions.

The Court said among other things:

"The narrow shackles imposed by a shortsighted construction of constitutional limitations have been progressively relaxed so as to give play to impulses which arise above mere beneficence and attain the recognition and dignity of a public duty and purpose. If occasion demands these provisions should to this end be given a liberal construction."

While this case involved the construction of the law creating a Firemen's and Policemen's Retirement System, and made considerable mention of the fact that such firemen and policemen after retirement were available for supernumerary duties, not being directly in point, it may afford an index toward the approach of the Court, indicating a tendency toward a liberal construction of the statute.

Furthermore, a careful reading of Section 93 of the Constitution, as applied to this act, might well indicate an intention on the part of the framers of the Constitution of 1890 to limit the prohibition to individual pensions for popular public officials, war heroes and the like, out of the spirit of gratitude for services rendered, but Section 93 undoubtedly did not contemplate such a retirement system as the Public Employees Retirement System of Mississippi, because no such retirement system was in effect at that time. Since the adoption of Section 93 of the Constitution, private industry has popularized the use of such retirement systems and fringe benefits; the State and political subdivisions of the State are almost perforce required to adopt a similar policy in the best interest of the operation of State and local government. There are distinct advantages to be gained from keeping trained and experienced personnel and there is the added factor that if retirants under such a system are receiving monthly benefits they will not be the wards of the State and will not require the appropriation of State or local funds in such form as Old Age Assistance.

It would be impossible to return this System to the status quo which existed at the time of its adoption. There is no question but that Article I, dealing with Social Security, is in accordance with Federal law and it merely represents enabling provisions for putting the Old Age and Survivors Insurance provisions into effect in covering State and local governmental employees. Considering the Public Employees Retirement System as a balanced, complementary system whereby Articles I and II each buttress and strengthen the other for the protec-

tion of a sizeable segment of our population and for the public good, it does not appear that expenditures of tax funds thereunder could be for a "private purpose." The members of the System have made sizeable and regular contributions of their own funds, in the form of salary deductions, which are in the nature of trust funds for their use and benefit. The procedure outlined by Federal law has been carried over and applied to the collection of contributions and making of reports under the State Retirement Annuity part of the Mississippi Retirement System. The employers' contributions reasonably appear to be in the nature of compensation for current services rendered and a part of the pay which members receive as and when services are rendered and salary or wages earned therefor, as in the case of private industry.

VIII. CONCLUSION

The writer is of the opinion that our System of state retirement is balanced, adapted to the needs of the members covered thereby and the State and political subdivisions deriving benefits therefrom, that it is for a public purpose, by no means a mere gratuity, donation or pension at public bounty, and that its constitutionality is clear, affording an element of stability to the economy of this State.

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STATE FINANCIAL AID FOR MUNICIPALITIES

This article is presented in the hope that it will serve to acquaint its readers with a pressing problem and to offer possible solutions to that problem. The article does not attempt to offer any one solution as *the* solution. That determination is one to be made by the legislature and the electorate.¹

I. BACKGROUND

One of the greatest single fiscal problems facing a majority of our states today is the determination of what action shall be taken to provide the municipalities with sufficient funds to meet the legitimate demands for services that are being made upon them. The problem is not illusory, but is very real. Increased revenues are vitally needed in order that these demands be met, and, until recent years, municipalities have not fared well with the legislatures in their attempts to obtain action that would relieve the problem. Mississippi has not been an exception. Our municipalities are in dire need of additional revenue; and, with the exception of the enactment of the sales tax, they have not fared well either. As has been pointed out, "Mississippi municipalities have been treated like the proverbial step-children."²

The crux of the municipalities' problems can be presented very simply by the following comparison: In 1940 the percentage distribution of all tax receipts between the three levels of governing bodies was, federal 39.4%, state 20.1% and local 31.5%. By 1956 the distribution had shifted so that the federal governing bodies, now received 72.3%, state 14.7% and local 13.0%.³

Another contributing factor to the creation of the problem has

¹Since this article was written, the Legislative Tax Study Committee has issued its recommendations. The recommendations made by the Sub-committee on Municipal Aid were as follows:

"(1) Increase the allotment of motor fuel tax revenue to municipalities by approximately fifty per cent

"(2) Permit municipalities to levy either a one half of one per cent or a one per cent city sales tax.

"(3) Retain the allocation of fire insurance premiums on the present basis.

"(4) The state to continue the five per cent charge for the collection of city sales tax.

"(5) City streets which are a part of the State or Federal Highway System be constructed and maintained at the expense of the State Highway Department.

"(6) The State Auditor be authorized to audit municipalities, municipal separate districts and special municipal school districts on the same basis as counties." Report of the Legislative Tax Study Committee to the 1958 Session of the Mississippi Legislature (1957) pp. 38-40.

According to a letter dated December 14, 1957, from Senator Ellis B. Bodron of Vicksburg, the Chairman of the Sub-committee on Municipal Aid, the committee contemplates the recommendation that the municipalities be granted some relief from liability for tortious acts, but definite recommendations had not been formulated.

²Bureau of Public Administration, *The Municipal Sales Tax in Mississippi*, University, Mississippi, 2 (July 1957) (hereinafter cited as *Sales Tax in Mississippi*).

³The Tax Foundation, *Facts and Figures on Government Finance, 1956-57*, 106 (1956).

been the tremendous population increase during the last twenty years. Our national population has grown by leaps and bounds at a rate the experts would never have admitted twenty years ago. It has been said that this growth of population has been accompanied by a constant shift of our population from rural to urban areas. While these are the words generally used to express the concept, they are not technically correct. The shift has been to the urban and *suburban* areas. The relatively new vogue of suburban living has gained great followings in all sections of the country. This is shown by the fact that one-half of the nation's increase in population between 1940 and 1950 was found in suburbs. This type of growth has increased the problems of the municipalities in that many of the suburbanities utilize the services of the municipalities while escaping the taxing jurisdiction of the municipalities. They thereby avoid paying for their use of some services. Our population has also become a very mobile one. This has caused cities which previously did not have serious fiscal problems to suddenly be confronted with them by immigration of workers.⁴

"Mississippi is one of three southern states (North Carolina and Arkansas being the other two) with an urban population less than 35 per cent of the total according to the 1950 decennial census. And although Mississippi is ranked in the column of those states losing population since 1940, conclusions that Mississippi municipalities are not being subjected to the same drastic influences which are shaping the fabulous growth of other southern cities would be erroneous. In the 1940-50 decade, while the state as a whole was losing population, the number of urban places grew from 48 to 53 and the urban population increased from 19.8 to 27.6 per cent. This percentage increase of 7.8 represents the largest such growth in the state's history and what is more the number of people living in the state's municipalities is currently estimated at close to 40 per cent The 1950 Census also showed tremendous increases for individual cities since 1940, e.g., 35.9 per cent for Clarksdale, 25.8 per cent for Columbus, 43.3 per cent for Greenville, 48.7 per cent for Natchez, 40.4 per cent for Tupelo, and 83.1 for Pascagoula."⁵

Mississippi's urbanization is also shown by the fact that in the 1940 census only two cities were shown to have a population of over 25,000 persons, while the 1950 census shows seven cities with a population of 25,000 or over.

In the long run this increase in population will normally bring in additional revenue, but the immediate situation requires large expenditures before the additional revenue can be realized. In the meantime, the population is clamoring for the municipalities to supply new services and facilities, and for improvement of existing ones. The physical plants generally are in need of rehabilitation because of the neglect which was heaped upon them by the restriction of the period from 1941 to 1945, the post World War II inflationary period and the

⁴Municipal Finance Officers Association, *Municipal Nonproperty Taxes 1* (1956) (hereinafter cited as *Municipal Nonproperty Taxes*).

⁵*Sales Tax in Mississippi*, p. 2.

Korean conflict. Not only must the municipalities supply the facilities and services necessary for health, safety and welfare, but the citizenry must now be supported 'in the manner to which they have become accustomed.' The demands for the pleasantries that we have become accustomed to in our ever-prosperous economy, have forced our municipalities to support a king's palace on a peasant's income. The net result is that they are forced to new excessive expenditures at a time when revenues are inadequate to cover existing needs. The inflationary cost of maintaining existing municipal services and facilities has made the increases in revenue inadequate to meet operating costs, to say nothing of expanding municipal operations.

"Unless our towns and cities are able to find additional funds, the inevitable result will be that they shall not be able to undertake any new services or functions and public improvements construction will be drastically curtailed. It may even be possible that the present level of services will have to be reduced as increasing population forces municipalities to extend their revenues to supply services to a larger number of people. Certainly, this is not a healthy situation and it is one which would halt the progress which municipal government has made toward a better standard of living for its residents. In a few cases, more efficient operations would help stretch available funds, but this can be carried out only to a limited extent and most cities have already exhausted this possibility."⁶

The plight of Mississippi's municipalities is shown by the fact that in 1955 the seven cities with over 25,000 population received only 0.9 per cent of their total revenue from state intergovernmental revenue, while the national average for cities in the same population category was 16.4 per cent. When the states are ranked by the amount of revenue their cities receive from state intergovernmental revenue, Mississippi is ranked number 45. Only Kentucky, Texas and Florida rank below Mississippi.⁷ In 1951, the counties received over 55 per cent of the total county revenue from federal and state grants. In the same year, the municipalities received 10 per cent of their total revenue from such grants.⁸ In 1956, the state collected \$150,000,000 in revenue. Of that figure only \$1,650,000 was returned to the cities. On the other hand, the counties received more than \$24,000,000.⁹

The great increase in population, unaccompanied by a correlative increase in revenue, has brought on many consequences which are not desirable. Most municipalities have been forced into a position of stringent economy which often borders on 'false' economy. The classic example of this is temporary and partial street repairs. The municipalities have had to borrow heavily to meet their financial needs at a time when they can not soundly do so. By adopting debt financing, the municipalities have only postponed the inevitable. They must not only find means

⁶The Alabama League of Municipalities, *Some Facts About Municipal Government in Alabama*, 39 (1955).

⁷Taken from U.S. Department of Commerce, *Compendium of City Government Finances in 1955* (1956).

⁸Sales Tax in Mississippi, p. 2.

⁹Stroupe, "Cities Yell for a 'Fairer' Share of Tax Dollars", *The Clarion-Ledger*, (Jackson, Miss.), April 21, 1957, § D, p. 3, col. 5.

of meeting their operating costs, but they must also find revenue with which to repay their outstanding indebtedness as it becomes due.

Although the municipalities have been faced with these pressing problems, at least one author has some hope that relief may be forthcoming in the foreseeable future:

"It is now likely that this trend of the past twenty years will be reversed and that the state and local tax share will rise in the near future. Barring unforeseen emergency, there is a better than even chance that the federal budget and federal tax rates will slowly decline in the next few years. Also, the federal government may follow the recommendations of the Governor's Conference to abandon certain taxes suitable for state or local collection and simultaneously curtail grants in aid. States and municipalities will enter or expand in tax fields vacated by the federal government. But the boosts in state and local taxes may go beyond merely 'taking up the slack.'"¹⁰

The author's prognostications would seem to take on added reliability in light of Congress' very recent efforts at drastic cuts in the federal budget. But until these things come to pass, the municipalities are still faced with the problem of where to get revenue.

"Some of the proposals that have been brought forward in the past decade to achieve the needed coordination and at the same time strengthen the local financial system include the following: (1) the abandonment of the federal amusement tax to local units; (2) the return of at least one per cent of the federal gasoline tax to the states; (3) the payment by the federal government of all added costs placed on local units by military and defense activities; (4) the payment of local taxes on property engaged in defense work by federal government; (5) increased federal aid for urban streets and highways; for low rental housing, urban redevelopment and slum clearance projects, and for municipal airports which are a part of the national airport system; (6) states should provide local units with adequate shares of state taxes and state grants, especially in the fields of education, highways and public welfare; (7) states should allow local units to impose broad-based and other nonproperty taxes; (8) local units should assess taxable real and personal property more equitably and scientifically, for this tax is still the most productive in local finance; (9) local units should impose non-property taxes, and make reasonable charges for services to residents so as to reduce the burden on real property; (10) local units that are too small and too weak to provide modern services should merge and consolidate with their neighbors into larger and more efficient units; (11) local units should have exclusive use of motor user taxes, general sales taxes, and taxes on corporate capital; (12) the establishment of a permanent national commission on intergovernmental relations to work continuously to achieve better coordination in public finance and administration."¹¹

¹⁰Freeman, "The State and Local Tax Burden", 26 *State Government* 116 (1953).

¹¹Municipal Nonproperty Taxes, p. 14.

II. ALTERNATIVE SOLUTIONS

With the causes of the problem in mind, five of the alternatives which are available and have been adopted by municipalities in order to solve their financial difficulties will be discussed. The alternatives are: (a) Legislative transfer of some functions and their cost from the municipalities to the counties or the state. (b) Legislative authorization to increase tax rates for presently authorized municipal revenue sources. (c) Legislative authorization for new additional revenue, chiefly by authorizing the levy of more taxes. (d) Legislative earmarking of specific state revenue for local sharing. (e) Legislative grants-in-aid to the municipalities.

Of the five alternatives, the first two can be discussed and dismissed with a few words. The latter three merit more consideration, and, therefore, will be dealt with in more detail.

*A. Legislative Transfer Of Some Functions And Their Cost
From The Municipalities To The Counties Or The State*

As pointed out by a major study in this field, there is little to be gained from an attempt to transfer functions now performed by the municipalities merely for the purpose of solving financial problems.¹² First consideration must be given to the difficulties that would arise under the Mississippi law if such a plan were followed. But, quite apart from this, the transfer of any function to another unit should be justified only on the basis of the determination of which unit could best perform the function, and not on the basis that it may offer an easy escape from the thorny problem of where to obtain additional revenue. Most municipal officials would prefer not to raise taxes if this unpopular action could be avoided. Municipalities generally feel that there must be continued "home rule"; each unit should be given the financial resources to carry out the functions which are historically and economically best performed by them.

It is generally felt that the continued transfer of activities and responsibilities to higher levels of government will eventually lead to a deterioration of the Republican form of government as we now know it. As one author states: "We can easily foresee that such a policy will slowly but surely turn local governments—and eventually state governments—into mere field offices of the federal government."¹³

*B. Legislative Authorization To Increase Tax Rates
For Presently Authorized Municipal Revenue Sources*

Although it is a much sounder business procedure, the increase of the rates of the presently levied taxes would undoubtedly meet with greater psychological resistance than the transfer of some functions to a higher level of government. The electorate now feels that the maximum rates are being applied. The increase of rates does not hold the public appeal that accompanies the transfer of functions. Although both would result in a greater drain on the taxpayer, the transfer of func-

¹²State of Illinois, Illinois Legislative Council, Financial Aid to Municipalities, 7 (1954).

¹³Freeman, *op. cit.* supra note 10, at 507.

tions seem to the usual citizen a lesser evil because it would usually be financed by hidden taxes, which are not as onerous as those taxes which are levied by persons with whom the people have continuous contact in their home community.

Few municipalities have followed this alternative in an attempt to solve their financial problems. Since the increase would depend on the local electorate for its enactment, the general feeling that optimum rates are now being applied has generally barred the increase of rates.

*C. Legislative Authorization For New Additional Revenue,
Chiefly By Authorizing The Levy Of More Taxes*

Probably the most phenomenal development in the field of municipal finances since the end of World War II has been the increased use of non-property taxes. This development has been especially pronounced in urban areas. "This has come about not only because of the absolute need for more money but in recognition of the fact [that] all economic sections of communities should contribute a share to the local coffer."¹⁴ This change in the attitude of the various legislatures is shown by the fact that no less than 24 states have expanded the taxing powers of the municipalities in varying degrees; some allowing numerous cities authority to levy additional taxes, while others have authorized additional taxes for only one city. The states which have passed enabling legislation include Alabama, Arizona, California, Idaho, Illinois, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Virginia and West Virginia.¹⁵

Mississippi's special enabling legislation referred to above was the authorization for the municipalities to levy a one-half per cent sales tax. The general apprehension and the fear that the adoption of the sales tax would drive business to non-sales-tax cities has been overcome by the urgent need for revenue by our cities. This change is attested by the fact that more and more municipalities have adopted the tax without an appreciable loss of business.¹⁶

In addition to the sales tax, the direct income tax levied by the municipalities has been gaining in popularity. As of September, 1954, twenty-seven cities in Pennsylvania, Ohio, Kentucky, Missouri and the District of Columbia had adopted local income taxes.¹⁷ This action has also been suggested as a partial solution to the revenue problems facing Alabama's municipalities.¹⁸

The states, in an attempt to find the most effective means of allowing the municipalities to levy additional taxes, have generally followed one of three systems: (1) The wide open variety; (2) selected taxes; (3) tax supplements.

¹⁴Municipal Nonproperty Taxes, p. 3.

¹⁵Anderson, "The Search for Money", 44 National Municipal Review 77 (1955).

¹⁶Sales Tax in Mississippi, p. 4.

¹⁷Municipal Nonproperty Taxes, p. 4.

¹⁸Reed, "State Tax Law Changes Needed by Cities", 13 Alabama Municipal Journal 1 (1955). "The arguments in favor of a local income tax are that (1) it provides substantial revenue; (2) it applies to non-residents and therefore de-

1. *The Wide Open Variety*

Pennsylvania has led the way in allowing the municipalities to find new revenues. In 1945, Pennsylvania passed its famous "tax anything" law which permitted the municipalities almost unlimited power to tax anything that was not already taxed by the state. It soon became apparent that Pennsylvania had gone too far in granting such broad and unlimited powers. Their experience under the earlier law was summarized as follows:

"It is the smaller communities where the real abuses have occurred under the act. One example is the multiple taxes on natural resources that have been levied in a number of places. As of May 16, 1949, there had been 187 taxes levied on coal, most of them based on the number of tons mined. Other taxes are based on the number of tons of coal washed, processed, hauled, loaded, and dumped. As a result, the same ton of coal has been taxed three or four times—in some cases at as much as 35 cents a ton. This places the coal operators in taxing communities at a competitive disadvantage with nontaxing communities and with other states. In other cases, timber, limestone, oil, natural gas, sand, and gravel have been taxed. "One small school district has levied a per capita tax of \$20. Another school district has levied a mercantile tax of 4 mills on retailers, whereas the usual rate has not been over 2 mills. A borough has levied a tax of \$300 on amusement machines. Interestingly, no municipality has levied a retail sales tax, though the authority is clearly present. The unpopularity of this tax in Pennsylvania, together with the fear of loss of retail business to other communities, has prevented its adoption."¹⁹

Realizing the existence of these gross inequities, the legislature, in 1949, moved to remove them. The act still permits cities, boroughs, townships and school districts to tax anything not taxed by the state, but there are now limitations and exceptions. Exceptions have been granted to natural resources, manufactured goods, and farm products. School districts are restricted in a levy of income taxes to the residents of their district. The aggregate amount of taxes that may be annually levied is limited to a ten-mill levy in municipalities and a fifteen-mill levy in school districts. The amendment has imposed rate limitations as follows; 1 per cent on the transfer of real estate, 1 per cent on earned income, 10 per cent on amusements, \$10 per person as per capita taxes, and 1 per cent on wholesale sales taxes and 2 per cent on retail sales. Where two taxing units have jurisdiction covering the same area, both units may impose the same tax, but the combined rate shall not

creates the tax advantages of the suburban areas over the central city; (3) it allows municipalities to do away with 'nuisance' taxes having small yields; (4) the individual earner provides a share of local taxes; and (5) the administrative cost is not prohibitive. Arguments against the local income tax are that: (1) the income tax is regressive in that it hits smaller incomes proportionately harder than large; (2) that it is another level taxing income and thereby confusing the tax picture; (3) administrative problems become complicated if it is applied to non-residents." Municipal Nonproperty Taxes, p. 5.

¹⁹Spalding, "Pennsylvania Amends Permissive Local Tax Law", 2 National Tax Journal 272, 273 (1949).

exceed the maximum amount allowed under the law. Agreements for the joint collection of the taxes levied are permitted. The taxing units may agree on the rate to go to each unit under a joint collection agreement, but if they do not so provide, one-half shall go to each unit.²⁰

"Under the Pennsylvania law as of April, 1955, a total of 2,807 local units out of an eligible 5,019—more than half—levied 3,719 non-property taxes. In order of adoptions, the per capita taxes lead with 2,112, followed by income taxes with 419, amusement with 398, deed transfer with 336, trailer taxes with 182, mechanical devices with 138 and mercantile with 70, and 64 others. Almost all cities, more than half the boroughs and first-class townships, one-fifth of the second-class townships, and more than half of the school districts of the state participate in this taxation. During the fiscal year 1953, total collections were more than \$42 million. The taxes in order of productivity were income, per capita, mercantile, amusement, deed transfer, mechanical devices, and trailer."²¹

2. *The System Of Selected Taxes*

In contrast to the broad general power of the local taxing authorities to tax anything within certain limitations and exceptions, most states have adopted permissive legislation which permits the municipalities to adopt certain specified taxes. In addition to the sales tax, enabling legislation has been passed by various states allowing the municipalities to impose the following taxes: admissions, amusement, cigarette and tobacco, deed transfer, garbage and refuse service charge, gasoline, income, liquor and alcoholic beverage, motor vehicle, hotel occupancy, sewer service charges, poll, street, and public utility gross receipts.

New York has drawn wide attention because of its unified approach to the authorization for the municipalities to levy new taxes. As early as 1934, New York City was permitted to adopt taxes on retail sales, gross receipts, and public utilities. But prior to 1947, other cities in the state were limited to a one per cent levy on the gross income of public utilities. In 1947 and 1948 under a New General Local Assistance Plan, the local governments were granted broader and more specific taxing powers.²²

"The local permissive tax law of New York authorizes counties and municipalities to impose the following taxes: (1) a 2% tax on retail sales; (2) a tax not in excess of 3% on receipts from sales of food or drink in restaurants, bars and other establishments; (3) a tax not in excess of 3% on charges made for utility services; (4) a tax on alcoholic beverages not in excess of 25% of the license fee prescribed by the state law; (5) a tax not to exceed 5% on admissions to amusements; (6) a tax on coin operated amusement devices not to exceed \$25 a year per machine; (7) a tax on passenger

²⁰Municipal Nonproperty Taxes, p. 3.

²¹Ibid.

²²State of Indiana, Fourth Report of the Commission of State Tax and Financing Policy, State Aid and Local Nonproperty Taxes, 37 (1956).

motor vehicles of \$5 to \$10 a year maximum; (8) a business tax on gross receipts not over $\frac{3}{5}$ of 1%; and (9) a tax on hotel rooms not to exceed 5% of the rent."²³

3. *The System Of Tax Supplements*

A 1951 study by the Municipal Finance Officers Association saw promise in the tax supplement as a way to combine the advantages of local taxing responsibility and state tax administration:

"One other development in recent tax authorizations is worthy of note. Tax sharing between states and local governmental units is common, but the action taken in Florida and in Wyoming where all receipts from a special tax are rebated to the political subdivisions from which the tax is collected is unique. Florida's action is the more unusual of the two states in that the local jurisdiction must pass an ordinance imposing the tax. A variation of this type of action is that which occurred in Mississippi where some cities were given permission to impose sales taxes which are to be state collected. Many tax authorities believe that this latter action is desirable since it lends itself to more uniform administration, better enforcement, and possibly better collection records for the types of taxes imposed. Joint administration of taxes between local subdivisions is permitted in New York and Pennsylvania, but the action in Florida, Wyoming, and Mississippi would indicate a possible future development with the tax being completely state administered but locally imposed. Such action would be particularly helpful in the event the tax is one also used by the state."²⁴

Other states have adopted the tax supplement for use in particular instances. New York municipalities are authorized to add a 1 per cent tax on the 2 per cent tax imposed by the state on the gross income of public utility companies. The state collects only its share of the tax, while the local supplement is paid directly to a designated local officer. North Carolina imposes a tax on persons operating chain stores within the state. The state rates are graduated according to the number of stores. Municipalities may levy a tax not to exceed fifty dollars for each store, in addition to the state tax. Florida levies an annual license fee which varies according to the business. Florida's cities and counties may impose supplements equal to 50 per cent of the state rate.²⁵

Results of the legislative attempts to give the municipalities additional revenue by authorizing the levy of new taxes have generally not been encouraging. The experience of selected states does not imply that broadened local taxing powers can restrain the growing pressures for increased state aid. They do show, however, that broadened local taxing powers do not assure such restraint. A state policy based upon substitution of local taxing powers for increased state aid, can be effective only by severely restricting continued enlargements of state aid programs. It must also be kept in mind that an over-abundance of

²³Municipal Nonproperty Taxes, p. 3.

²⁴Id. at 5.

²⁵Sly, "Tax Supplements for Municipalities", *The Tax Review* (New York 1947) p. 8.

miscellaneous taxes may tend to discourage industry which this state is so desperately trying to attract.

Mississippi has found that the tax supplement system, utilized through the imposition of the sales tax, is not wholly without its defects. According to statements attributed to Mayor Bill Caraway of Leland, executive vice president of the Mississippi Municipal Association, the state collects the one-half per cent for 50 cities at the same time they collect the statewide tax, but for performing this function, the State Tax Commission collects a 5.0 per cent collection fee. When compared with 1.64 per cent actual cost of collecting the statewide tax, the collection fee would seem to be out of line.²⁶

Despite the objections to the granting of broader taxing powers to the municipalities, it continues to be a prime recommendation as a solution to the municipalities' revenue problems. The Indiana Tax Study Commission made the following recommendation:

"That enabling legislation be enacted to permit cities and towns to broaden their tax base. One likely form for this broadening to take would be a surtax upon the gross income tax (not to exceed in amounts one-quarter of regular gross income tax payments), levied by cities and towns, and subject to referendum."²⁷

This alternative has also been advanced as an advisable solution to Arkansas' problems:

"Need for additional municipal revenue should be met by granting a broader taxing power to city councils and municipal voters. If granted a broader power to tax, cities would be given a measure of statutory home rule in the area of local finance. Need for additional revenue obviously is greater in some than in other cities. City councils, subject to popular referenda, can appraise needs for additional revenue and willingness of local voters to pay additional local taxes. More of the cost of municipal government could be paid by local citizens and the cost more equitably shared if the need for additional municipal revenue in Arkansas should be met by statutory grant to cities of a broader taxing power."²⁸

D. State Collected Locally Shared Taxes

Shared taxes as used herein are those taxes that are statutorily imposed by the state legislature and which are also statutorily shared with the community wherein the taxes are collected. Shared taxes differ from the tax supplement in that the legislature, when establishing shared taxes, imposes a state tax with provisions for sharing, while in the tax supplement the legislature imposes a state tax with authorization for the municipalities to impose a tax in the same nature, but in addition to the state tax. Generally in both cases the state collects the proceeds, but in the case of tax supplements the tax is imposed by the municipality, while the shared taxes are imposed by the legislature

²⁶Stroupe, "Cities Yell for a 'Fairer' Share of Tax Dollars", *The Clarion-Ledger*, April 21, 1957, § D, p.3, col. 5.

²⁷State of Indiana, Commission on State Tax and Financing Policy, *Final Recommendations*, 63 (1954).

²⁸Alexander, *Municipal Finance in Arkansas*, 34 (1955).

The shared tax concept had its beginning in the 1920's when most states were imposing a gasoline tax. Many of the states provided for return of a part of the proceeds to the municipality of its origin. The Wisconsin income tax continues to be a shared tax, although the method of distribution and the rates have been changed. Ohio, Michigan, and Indiana have imposed an intangible property tax as a shared tax. The tax is sometimes imposed on the income from the intangible property and sometimes on the value of the property. In contra-distinction to Mississippi, Michigan shares its sales tax with local governments. The municipalities receive one-half cent of the state's three cent tax. New York state at one time shared the following taxes; alcoholic beverage, corporation franchise, personal income, utility, and motor vehicle. These shared taxes now have been replaced by per capita payments; other taxes are still shared. The motor vehicle fuel taxes are distributed to the counties outside of New York City on a mileage basis. The mortgage recording tax is refunded in full by the state to the county of origin.²⁹

Shared taxes, as opposed to grants-in-aid, are generally without the conditions handed down by the state legislature. Local units are statutorily given a share of a specific state-collected tax free of any restriction as to the manner or purpose of expenditure. But, as in grants-in-aid, the municipalities are at the mercy of the state legislature which may change its fiscal policy at any session. Other advantages and disadvantages of shared taxes have been presented as follows:

"One advantage of this action would be elimination of competition among cities for low taxes on trade, since rates would be equal over the state. However, the additional sums shared would have to be made up by the state from some other source; hence, no net gain is apparent. The most serious objection against this course of action is that since the cities would not have control over rates, their revenue patterns would not represent what they deemed necessary in taxes to cover demanded services, but rather what the legislature felt necessary. The loss of home rule might be accompanied by further losses if conditions were established with which the cities would have to comply in order to qualify for their tax shares."³⁰

E. Grants-In-Aid To Municipalities

As previously stated, the New York legislature has seen fit to abandon most of its shared taxes. To replace the shared taxes, the Moore Plan was adopted. Under this plan, the state attempts to administer grants-in-aid according to the municipalities' needs in the various fields of education, public health, welfare, etc.

"Briefly, the novel features are these: (1) discontinuance of six state-collected taxes shared with local governments; (2) establishment in their place of annual per capita grants to all classes of municipali-

²⁹State of Indiana, Fourth Report of the Commission on State Tax and Financing Policy 1956, State Aid and Local Nonproperty Taxes (Indianapolis 1956) pp. 41-42.

³⁰The Alabama League of Municipalities, Revenue for Alabama's Cities, 84 (1956).

ties; (3) tapering of provisions so that the shift from shared-tax to per capita grants would not upset the financial balance in local units; (4) division of the state executive budget and the state general fund into two parts, local assistance and state purposes; (5) establishment of two reserve funds to help stabilize the state's revenues, the money to come from any excess of revenue in one year over a norm determined in advance for state and local expenditures. This program did not aim to increase state aid, but to enable localities to count upon a fixed amount of money from the state regardless of the cyclical sensitivity of the state's tax system. It was the first state program to provide grants-in-aid for general governmental purposes."³¹

The Moore Plan attempts to distribute the grants-in-aid according to the needs of the municipalities. To accomplish this purpose, the legislature has attempted to approximate their needs by the use of formulas and per capita distribution. In establishing the basis for the distribution of the per capita grants, the New York legislature recognized the fact that less revenue is needed per citizen to supply the municipal functions in a village than it does in a city. The rates established were as follows; cities receive \$6.75 per capita, towns \$3.55 and villages \$3.00 for general purposes. The state distributed \$73,134,000 in per capita payments during the fiscal year ending in 1953, which was about one-fifth of all state expenditures for financial aid to municipalities during that year. The payments are made to the municipalities on a quarterly basis. With one exception, the payments all go into the general fund. The only exception is that in New York City the first \$500,000 received goes into the police pension fund. The remaining four-fifths of the financial aid is distributed on the basis of special formulae, and for specific purposes. The formulae attempt to approximate need by taking into consideration those factors which create the need. For example, the aid for highway purposes is based on the amount of road mileage located within the corporate limits.³²

Under the Moore Plan all general revenue received by the state is placed either in a State Purpose Fund or a Local Purpose Fund. The amount going into each of the funds varies from time to time, with the State Purpose Fund receiving approximately 40% and the Local Purpose Fund 60%. Any surplus remaining in the fund at the end of the year is transferred to a reserve fund to be held for use in years when the revenues may not be sufficient to meet the commitments.³³

By the adoption of the Moore Plan, the New York legislature has undertaken a scheme which is unique. Because of its nature, it has been subjected to a great deal of scrutiny. The most apparent defect lies in the fact that most grants are given with built in curtailments. A prominent writer on Mississippi affairs thinks that the loss of power by the municipalities that accompanies the grants-in-aid will eventually lead to a strong centralized government far removed from the municipi-

³¹Municipal Nonproperty Taxes, p. 9.

³²State of Illinois, Illinois Legislative Council, Financial Aid to Municipalities, 27 (1954).

³³Ibid.

palities.³⁴ Apprehension on this point has also been expressed by other southern states.³⁵ Other evils of the grants-in-aid system have been expressed as follows:

"Grants resulted in overextensions of central controls and in undesirable meddling with local initiative and administration. There is a tendency for the proponents of grants-in-aid programs to rush to a central government for quick and dictated results. At the federal level they depreciate the capabilities of the state, and at the state level they depreciate the capabilities of the localities."³⁶

Despite its inherent defects, the Moore Plan has received wide attention and has served as a model for similar provisions in other states. The plan does allow the municipalities to fulfill more efficiently their functions as planners. The governing bodies can rely on a fixed amount of state aid each year regardless of the rise and fall in state revenues, since the reserve provisions tend toward considerable stability. With increases in the per capita allowances to compensate for the rise in the cost of services, the plan may still prove to be effective.

III. GENERAL CONSIDERATIONS

The long term trend of federal, state and local tax relationship reflects a definite upward shift from state and local governments to the federal government, and from local governments to the states. This trend, accompanied by the relative de-emphasizing of locally administered property taxes, has caused the states to become responsible not only for support of their own services, but also for a growing portion of the local services. The pressures upon the general property tax, which has been the traditional source of state and municipal taxation, have found expression in three major developments: (1) A general withdrawal by the state from the property tax field in favor of local governmental units, which has brought about the result that this tax has become largely a local source of revenue.³⁷ This result has only been possible through the enactment of state sales taxes and state income taxes. (2) A general demand for new property tax sources at the local level. These demands have resulted in the broadening of local taxing powers as a way for local governments to finance themselves. (3) A growing amount of state aid to local governments as a way to supplement local property tax revenues with non-property tax revenues collected at the state level. This development has resulted in an increasing separation between tax

³⁴"The 'free money' from Jackson has a tendency to blind local government officials and citizens to the gradual loss of their voice in programs for which the funds are disbursed. Like Federal aid to the states, state aid to counties and cities likewise have 'strings' attached, whether visible or not. Lethargy in the diminishing local control in state-aid programs leads to a gradual loss in other fields and finally a big centralized government far removed from the county courthouse and city halls." Toler, "Larger Mississippi Cities Bear Lions Share of Cost of Centralized Government", *The Commercial Appeal*, (Memphis, Tenn.) February 10, 1957, § V, p. 4, col. 1.

³⁵See: *The Alabama League of Municipalities, Some Facts About Municipal Government in Alabama* 39 (1955).

³⁶Burton, "Grants in Aid: Good and Evil", 39 *National Municipal Review* 11 (1950).

³⁷This is not true in Mississippi. See *Miss. Code Ann.* § 9877 (1942).

raising responsibility and spending responsibility.³⁸

The last two developments have been the object of several critical appraisals. The third development particularly has given rise to serious discussion because of its implications for the justification and future development of local self-government.

Concerning the second development, the Municipal Finance Officers Association stated:

"Since cities are essentially creatures of the state and are dependent upon the state for specific authorization to impose taxes, the number of adoptions of new revenue sources has been directly related to permissive legislation adopted by the states. In this regard, judging from the number of municipal revenue measures adopted by the state legislatures, there appears to be a tendency to change from the philosophy of granting state aid and sharing states' taxes to relieve revenue pressures on the municipalities, to a policy of permitting these municipalities to sink or swim in finding their own revenue salvation. Since 1943 at least 27 states have taken direct action with respect to non-property taxes that may be used by municipalities. Earlier authorizations, such as granting New York City and New Orleans permission to use sales taxes and permission granted to Philadelphia to impose a payroll income tax and other taxes, had occurred, but such actions were greatly accelerated during the 1940's."³⁹

The third development has received special attention from the various Indiana Tax Study Commissions. Reporting in 1952, the Indiana Commission recognized the trend toward the state's role as collector of taxes for local purposes and commented as follows:

"It is through the payment of a growing amount of state aid to local units that the local governments can collect less than one-half of all state and local revenues but spend more than two-thirds of the total. From the standpoint of tax policy in general, and the apportionment of tax responsibility in particular, the persistent trend toward 'property tax replacement' is significant on two major counts. *First*, it represents a shift from local taxes to state taxes and a corresponding shift in tax responsibility from local officials to the state legislature. Not the least important result of this shift is a separation of the taxing function and the spending function. This creates the dilemma of preserving democratic 'home rule' at the local level within an environment of increasing local support from state revenue sources. It is axiomatic that control follows financial support and the trend toward increased state support of local services implies a potential increase of state control.

"*Second*, the shift from locally assessed property taxes to non-property state taxes has the effect of lessening the pressure for assessment reform. It is, of course, true that the use of assessed valuations as a

³⁸State of Indiana, Commission of State Tax and Financing Policy, Preliminary Report 1954, 31 (1954).

³⁹Municipal Finance Officers Association, *Municipal Nonproperty Taxes*, 1 (1951).

basis for apportionment of state aid to local governments places a premium upon equalized assessments as among local taxing jurisdictions. This raises the question as to whether or not another basis upon which to apportion state aid might be desirable. This factor has been responsible for reassessment programs as a means of bringing greater equity to the apportionment of state aid for education and other local services."⁴⁰

The significance of the trend toward increased state aid support for local governmental services is by no means limited to the potential abuses associated with a separation of taxing responsibility and spending responsibility. When a prudent state provides substantial amounts of support for local services, it naturally seeks some assurance that its funds are spent in a manner which will justify the outlay. Whatever form it may take, this means some measure of state control and direction. Three common types of such controls are:

First, state perscribed service standards and methods of operation which must be met by local governments as a condition for receiving state grants.

Second, earmarking of state funds for specific expenditure purposes with the result that local budgets and local services must be tailored to these requirements.

Third, the ultimate transfer of services from the local governments to the counties or to the state itself.

These considerations are real and they have commanded attention in several states. For example, in 1954, the Indiana Commission on State Tax and Financing Policy reported:

"One problem which continually arises in connection with state aid is that of the degree of state supervision and control to be exercised by the state over state aid funds. State officials are usually reluctant to turn funds over to local units unless some supervision of the expenditure of these funds is maintained. Local units, on the other hand, often oppose this control as dictatorial and an infringement upon local rights. The question of local responsibility is also an important one. Dangers exist in having funds raised at the more remote state level, and spent at the more intimate local level. Local officials, in this case, gain all of the benefits of providing services but none of the responsibility of raising the funds to pay for these services."⁴¹

In 1955, the Federal Commission on Intergovernmental Relations called attention to the transfer of service responsibility and the implied threat to local self government in these terms:

"The lack of local revenues has been offset in some local governments by the transfer of one or more activities to a higher or different level of government. Several cities transferred responsibility for all phases of public welfare, including general assistance, to their counties. Under the stimulus of Federal grants city and county

⁴⁰*Ibid.*

⁴¹State of Indiana, *op. cit. supra* note 38, at 55.

health departments are being consolidated usually under county administration. In some states the county has become the smallest unit for highway purposes and in others, such as North Carolina and Virginia, the State virtually controls all highway construction and maintenance except for some city streets and rural roads. The movement has this clear significance: If the lack of local revenue continues, the local governments, ultimately will be forced to surrender the control and actual performance of many activities to the State and National Governments.

"The other alternatives which will follow a continuing inadequacy of local revenues are (1) poor services and public facilities, (2) greater State grants and controls, (3) greater Federal grants and controls, and (4) a hodgepodge revenue system which is both illogical and inadequate."⁴²

At another point in its report the Federal Commission drew a contrast between broadened local taxing powers and transfers of service responsibility:

"The extension of local taxing powers is one alternative to grants-in-aid. The larger cities which have larger per capita operating expenses but which also have large resources which they cannot now tax locally would profit from such a change. The granting of such powers would do away with raising revenue from all to serve a few and, in some cases, from a few to serve all. Even though these larger cities and counties were to levy the same kind of taxes as the State or National Governments, the total tax burden would probably be less if the larger cities and counties which appear to have the greatest present needs could raise directly a greater portion of their own revenue.

"Another alternative to grants-in-aid is the transfer of activities or functions from the local to the State or National Governments. This has already been done with respect to some activities in some states. While this may be the most simple alternative and while it may be the least expensive method of operation, it is not entirely consistent with the theory of federalism in the United States nor consistent with local, responsible democracy. Perhaps the transfer of functions and improvements of the revenue system could be accomplished simultaneously by enlarging the areas of government and/or the areas of taxation so that there would be less need of equalization by providing larger areas with greater breadth of taxation."⁴³

There is another side to the question of providing local governments with taxing powers sufficient to enable them to support themselves. Many of the local governmental units are small and there may be serious doubt about their ability to administer some of the possible non-property taxes economically enough to make them a practical source of revenue. The Federal Commission suggested the use of state financial incentives to accomplish reorganization of local units:

⁴²Commission on Intergovernmental Relations, *An Advisory Report on Local Government*, 51 (June 1955).

⁴³*Id.* at 41.

"The States can also improve their own schemes of local government grants by recognizing the diverse needs of various types and sizes of governmental units. At the same time the States can, by grants or other devices, encourage the formation of government units large enough to solve part of the problem caused by the unequal distribution of taxable assets among governments geographically adjacent to each other."⁴⁴

Presumably state aids would be the vehicle by which the financial incentives would become effective. Whatever the merits of local governmental reorganization may be, however, it should be pointed out that financial incentives to accomplish it would represent another use of state aids to direct or control local governmental decisions. It is in this respect that the local tax supplements upon the state gross income tax offers an important advantage over both grants-in-aid and locally administered non-property taxes. Although the supplements would assign responsibility for levying the tax squarely upon the local governments, it would not assign local governments the added responsibility for administering the new tax.

The growing influence of state control on municipalities as a consequence of state aid, raises an important question with regard to local self-government. It seems that some of the views expressed in 1949 by the Illinois Revenue Laws Commission may be applicable also to Mississippi.

"In studying the State and local tax system, the Commission has been aware of the fact that there is a strong sentiment for local self-government in Illinois. The Commission thoroughly approves of this attitude and believes that a strong system of local government is one of the foundation stones of democracy. Yet it must be recognized that the administrative and financial responsibility for local functions go hand in hand. Functions that are largely or exclusively local in character should be financed from locally-imposed taxes. This practice has been followed in Illinois and the Commission believes that it should be continued. Departure from this policy will result inevitably in a weakening of local government. State aid for state functions performed by local governments is a corollary of local financial responsibility for local functions."⁴⁵

This concept of state and local fiscal relationships was basically restated by the special Legislation Commission Studying Municipal Revenue Problem in its report to the 1953 Illinois General Assembly. In discussing factors relative to their recommendation that no new programs of direct state aid to municipalities be undertaken at that time, the report stated:

"There is, moreover, the Illinois tradition that municipal government must, to the fullest extent possible, be dependent upon its own resources for support and that the state government should neither subsidize nor control local government except as the gene-

⁴⁴Id. at 52.

⁴⁵State of Illinois, Revenue Laws Commission Report, 6 (1949).

ral welfare may require in order to assure the performance of basic functions in a responsible manner"⁴⁶

This is why the separation of the spending function and the tax raising function is regarded with a measure of alarm, not only by state officials but also by the municipalities, because it will, of necessity, encroach upon the complete independence of local self-government. But since complete freedom of local municipal government cannot exist even in a state which puts considerable stress on local self-government, it seems that the use of state aid as a convenient way to provide financial support to municipalities is with us for good.

IV. PROPERTY TAX REFORM

"It has been said that the property tax is like a mule: no pride in ancestry, no chance of progeny. History records innumerable attempts to make the property tax fair and equitable; few of them succeeded for any length of time. Evasion and inequity have characterized property taxation through the ages."⁴⁷

These seem to be harsh words for an old friend who has served well. The real property tax, although it still supplies a basic part of our revenue, has suffered a relative decline in importance. Its greatest defect seems to be its inability to produce at a greater rate than it has historically.

During the period from 1942 to 1953, the national collections of the property tax dropped from 63.1 to 48.7 per cent of the total general revenue.⁴⁸ The property tax in Mississippi has shown an almost identical decline, but over a shorter period. In 1948, the tax constituted 63.3 per cent of the total revenue, while in 1955 it constituted 48.0 per cent.⁴⁹

"Viewing the total tax picture of the nation as a whole, property tax revenue only doubled in volume in the decade between 1942 and 1952, but sales and gross receipts taxes have tripled as have revenue from custom duties; corporation income taxes have quadrupled, and individual income taxes have increased eight times. Total tax revenue has quadrupled."⁵⁰

The relative decline in the importance of the property tax has been caused by several developments. The state governments formerly received a substantial part of their revenue from the tax, but now have virtually withdrawn from the field. This is not true in Mississippi. Under section 9877 of the 1942 Code the state now levies a four mill tax on all taxable property in the state. The transfer of major responsibilities to higher units of government, and the great appeal of state and federal aid have also added to the decline of the property tax.⁵¹ The

⁴⁶State of Illinois, Legislative Commission on Municipal Revenue, *Municipal Revenue Problems* 8-9 (1953).

⁴⁷Freeman, "What Ails Property Tax?", 44 *National Municipal Review* 506 (1955).

⁴⁸Anderson, "The Search for Money", 44 *National Municipal Review* 76 (1955).

⁴⁹U. S. Department of Commerce, *Compendium of City Government Finances* (1949 and 1956).

⁵⁰*Municipal Nonproperty Taxes*, p. 13.

last development, but not the least, is a growing distrust of and contempt for the property tax, because of the gross inequities in the assessment and the malpractice in the administration of the tax.

"Perhaps the most appealing method of increasing municipal revenues is to reform the property tax system."⁵²

"A retardation in the rate of new non-property tax adoptions within the past two years plus a rejuvenation and general uplifting of property assessments in some cities, however, may well have the effect of stabilizing the relative position of property taxes in the overall revenue structure of cities. A good case can be made for the proposition that many municipalities have written off the property tax as an inadequate levy under modern conditions, when, in fact, the tax with improved administration and enlightened public understanding could be made more equitable and productive."⁵³

But as pointed out by the Municipal Finance Officers Association:

"How different it has been to get increased local property assessments, but how easy to get tremendous grants from the state for local education, highways, and welfare. If property holders fear that unpropertied majorities might control governing bodies and thus unduly burden property (and this is often a just fear), by shackling local revenue power they directly make possible or even directly encourage more state centralization and less local freedom."⁵⁴

Alabama has found that the chief weakness of the property tax system is the failure to follow the statutory requirement for valuation. It is felt that the present system in Alabama places a premium on competitive under-assessment; since a large part of the property tax collections go into the state for school and general purposes, a city with a high level of property valuation will pay more than its fair share of the state's school fund.⁵⁵ New Jersey has found that all taxable real estate within the state is assessed at an average of about one-third of the value at which it should be assessed. On the basis of this finding the Commission concluded that the average tax rate of \$6.77 per \$100 represents an average effective tax rate of \$2.30 per \$100 valuation. The tax revenue from the property tax could have been tripled without an increase in tax rates. Proper administration is very little to ask when it will triple revenue. The report goes on to say: "We have bad laws, badly administered, because taxpayers of the state have been willing to accept bad compromises with fair and equal taxation."⁵⁶

A leading author has criticized the property tax system as follows:

⁵¹Freeman, *op. cit.* supra note 47, at 517.

⁵²The Alabama League of Municipalities, *Revenue for Alabama's Cities* 81 (1956).

⁵³Anderson, *op. cit.* supra note 48, at 79.

⁵⁴Municipal Nonproperty Taxes, p. 13.

⁵⁵The Alabama League of Municipalities, *op. cit.* supra note 52.

⁵⁶Arnold, "New Jersey Commission on Cities Property Tax Evils", 42 *National Municipal Review* 294 (1953), citing New Jersey Commission on State Tax Policy, Sixth Report, *The General Property Tax in New Jersey* (1953).

"The property tax in the United States originated long before the others; its organization and methods are hopelessly outdated. In no other tax field do we elect administrative officials. But the great majority of property tax assessors are elective. It is quite likely that our income tax administration would be in no better shape if the employees of the Internal Revenue Service were locally elected without regard to technical qualifications.

"The appraisal of property—just as the verification of income tax or sales tax returns—is a technical job which requires professional skill and knowledge. It is not supposed to be a policy-making job. The employees of the Internal Revenue Service or of the state tax department do not claim the discretion to apply the tax rates to 30 per cent or 50 per cent of a taxpayer's income or sales volume. But property tax assessors exercise such an authority. The question is sometimes asked what difference it makes whether the size of the tax levy is raised or lowered by manipulating assessments or by adjusting tax rates? The difference is that in the former case under legal millage limitations the policy decision is shifted from the legislative—the city council, board of county commissioners, school board—which under the law has the power, to a single official who usurped it. Instead of the representative bodies which are responsible for the operation of their governmental units, it often is the tax assessor who decides how much they can spend.

"It has been said that the tax assessor has made himself the budget officer for all local governments. That is not quite correct. A budget officer administers a budget but does not set its size or the amount of the tax bill. That power belongs to legislative bodies. The property tax assessor is the only single public official in the United States who can in effect determine tax rates and set the amount of taxes which the residents of a jurisdiction must pay. He exercises that authority not by law but by arrogation. He has made himself in effect a one-man legislature. Often he makes vital decisions about the operations of cities, counties or school districts although he has no responsibility for their activities.

"A long and disgraceful record has proven that local property tax administration except in rare circumstances will fail. Sporadic attempts at improvement by local initiative or under state stimulation have at best been temporarily successful. If we want property tax assessment to cease to be a political football then we must put them on a scientific and objective basis. An increasing number of people are coming reluctantly to the conclusion that this will not be accomplished until the appraisal of property is divorced from local administration and made uniform by the same method by which intercounty utility property is appraised in most states—under uniform standards on a statewide basis. Home rule will be more effectively guaranteed by leaving the decision on tax rates in fact as well as in name to locally elected responsible bodies.

"It is unlikely that local government will be able to cope with the task that lies before them in the next decade without a restoration of the property tax. The need for added services and facilities is

vast and urgent; present inequities are drastic and widespread. Minor corrections or palliative measures will not do the job."⁵⁷

With this background in mind the New Jersey Commission concluded that the present inequities of the property tax can be eliminated in two ways: (1) By establishing an adequate organization for the local assessment of property, and (2) by placing the assessment process, so far as possible, upon defined and objective standards. The following recommendations were then made:

- “1. That the county be established as the primary assessment district with a fully qualified county assessor properly compensated.
2. That provision be made for the absorption of all qualified assessing personnel now employed in the various taxing districts.
3. That the cost of county assessment be apportioned among the municipalities of the county in proportion to their assessed valuations and that such costs be a charge against the budgets of the respective municipalities.
4. That the assessment process be recognized as a professional operation to be performed by technically qualified personnel, removed from all political consideration.
5. That the county boards of taxation be retained for the purposes of appeal and review, but that their title be changed to board of tax review with appropriate county designation, i.e., Board of Tax Review, (Blank) County Division.
6. That the Division of Taxation and the Division of Tax Appeals in the state's Treasury Department, be retained.
7. That the following method of valuation replace the historic ‘true value’:
 - (a) Valuation for the purpose of assessment of property taxes should be made biennially, except new construction, additions, abandonments and demolitions.
 - (b) Existing statutes should be revised in accordance with the letter and spirit of the tax clause of the new constitution to assure review and correction of discriminatory assessments regardless of whether or not the complainant's property is assessed at less than its full value.
 - (c) Standards of ‘true value’ as applied to buildings and improvements, in recognition of the widespread practice of many assessors, should be defined by statute as follows:

‘True value’ shall mean the average of reproduction costs less depreciation and the gross actual or imputed rental value of each property, to be ascertained under such uniform rules and regula-

⁵⁷Freeman, “What Ails Property Tax?”, 44 National Municipal Review 510-511 (1955). In Mississippi the method of assessment of real and personal property can be accomplished in either of two ways. The municipal assessor can either copy the assessment from the county assessment rolls, or he may make an independent assessment each year. The method to be used is determined by the governing authorities of the municipality. Miss. Code Ann. § 3742-03 (1942). The amount of the levy is limited to 15 mills on the dollar except in emergencies. Miss. Code Ann. § 9483 (1942).

tions as may be promulgated by the director of the Division of Taxation.

Land shall be valued by the assessor as under present practice.

In order to assure the benefits of the new formula without depending upon radical reductions in the present high tax rates, the legislature could provide for assessment to be made 30 or 50 per cent of the valuation as determined by formula. Reproduction costs shall be determined according to the average level of construction costs during the five years immediately preceding the year for which the assessment is made.

Depreciation shall be allowed in accordance with such schedule as the director of the State Division of Taxation shall promulgate, taking into consideration the actual use experience with different classes of buildings; but in no event shall depreciation exceeding 80 per cent of reproduction cost be taken, so long as a building is in use.

8. That the general tax law be amended to require every owner of real property, upon suitable penalty, to file a confidential informational return with the assessor, setting forth so far as is possible: (a) the original cost of his property; (b) date of construction; (c) dates and costs of additions and modifications; (d) annual gross rentals for income producing properties; (e) the consideration for which the property was last conveyed; (f) insurance coverage (exclusive of land and foundations); (g) and, if the property is currently for sale, the price at which it is offered, together with all encumbrances.

9. That the taxation of household goods and personal effects be abolished.

10. That taxation of all other locally assessed personal property be administered by the county assessor, as in the case of real estate and improvements under the proposed plan.

11. That inventories of raw materials, work in process, finished goods, and stock-in-trade be assessed at a stated per cent of average book value during the year.

12. That machinery and equipment be assessed at a stated per cent of its book value, allowing for normal depreciation."⁵⁸

Although the recommendations cited were proposed as reforms to the New Jersey property tax system, they may be readily adapted to the systems of most states, including Mississippi. A program of this type would, naturally, be complicated and expensive, but it would soon pay for itself in higher returns.

The New Jersey report, after stating that the proposed changes are absolutely necessary to place the property tax on an equitable basis, concluded: "It is the people and the legislature who must decide if they will be satisfied with anything less."⁵⁹

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⁵⁸Arnold, *op. cit.* supra note 56, at 295-296.

⁵⁹*Id.* at 296.

TERRITORIAL JURISDICTION

I. BACKGROUND

At first blush, the term 'Territorial Jurisdiction' seems self explanatory. It would appear to be simply the geographical area over which a particular court may exercise its power. However, a careful study of this term's application presents many confusing problems. The Mississippi Supreme Court has often used this term, and apparently confused it with other terms on several occasions. This problem was recognized in an excellent article written by George Schweitzer, on the subject of Special Appearances.¹ The author wrote: "The term territorial jurisdiction has been used by the Mississippi Court frequently and often loosely."²

It should be noted at this point that Mississippi is by no means alone in this problem. Recently, the Illinois Supreme Court said:

"There has been much confusion in the cases due to undue restrictions from a narrow interpretation of the constitutional provisions to the confounding of the questions of territorial jurisdiction and venue, and unnecessary and inaccurate dicta."³

Realizing that the problem exists, an answer is sought. Writers have recognized the problem⁴ but an answer of apparent clarity has not been offered.

'Territorial Jurisdiction' has been defined as: "The territory over which a government or a subdivision thereof has jurisdiction."⁵ Further, "Territorial Jurisdiction of a court ordinarily connotes power over property located within the territory and power over persons residing therein, or may be found therein . . ."⁶ Many good definitions can be found to describe this term,⁷ none of which are conclusive. Probably the best effort to define 'territorial jurisdiction' was made by the New York Appellate Court when it stated:

"The concept of territorial jurisdiction imports power of the court over all the property within its confines, and over all its residents and over nonresidents while sojourning in its territory. It is illustrated by the provision territorially to the county or to residents of the county wherever found within the State. Naturally, there is no restriction as to the residence of the plaintiff, because within the State, a plaintiff may select the County or City within which he chooses to sue. The significance of territorial jurisdiction lies in its relation to property and to the person of defendants."⁸

From the definitions above, it can be plainly seen that no simple definition can be formulated. Apparently, all definitions seem to label

¹Comment, 19 Miss. L.J. 59 (1947).

²Ibid. The author further states: "A full discussion of 'territorial jurisdiction' is not within the scope of this note . . ."

³Turnbough v. Dunlap, 406 Ill. 573, 94 N.E. 2d 438 (1950).

⁴Coffman, "Jurisdiction or Venue?", 20 Minn. L. Rev. 617 (1936).

⁵Black, Law Dictionary (4th ed. 1951).

⁶41 Words and Phrases (Perm. ed. 1958 Supp.), 405.

⁷See, e.g. 21 C.J.S., Courts § 20.

⁸American Historical Society v. Glenn, 131 Misc. 296, 227 N.Y.S. 174 (1928).

the term as always relating to a certain geographical area, and the power of the Court to decide cases in that particular location, and no other. It is a geographical restriction on the court rather than a limit on its power to decide certain types of cases.

Before a study of the Mississippi cases involving this term is made, a brief examination of some of the other terms closely related to 'territorial jurisdiction' will be beneficial.

A. Jurisdiction⁹

There are many definitions of the term 'Jurisdiction.'¹⁰ Fundamentally it means the power or capacity given to a court, tribunal, board or officer to hear, entertain and determine certain controversies.¹¹ One court, in recognizing the multitude of meanings connected with this word, stated: "While there are many definitions of the term [jurisdiction] . . . fundamentally, the term means the power or capacity given by law to a court to hear and determine certain controversies."¹²

Mississippi does not take exception to this general definition.¹³ The Mississippi Supreme Court, speaking through Justice Smith said: ". . . jurisdiction connotes the power to decide a case on the merits . . ."¹⁴

One should not be deceived by this very general definition, for the term has been used in conjunction with many other terms,¹⁵ thus giving it an extremely confusing connotation. For example, the New York Court said:

"The word 'jurisdiction', apart from other general meanings, has to every lawyer at least a two fold significance which may perhaps be conveniently divided into territorial jurisdiction, and jurisdiction of the subject matter."¹⁶

It can thus be seen from this illustration how loosely the courts use the term 'jurisdiction'. In order to partly understand in what sense the word 'jurisdiction' is being used, the phrase as a whole must be looked to, and not the individual words applied as modifiers.

⁹Jurisdiction is derived from the Latin *juris dicto*, "I speak by the law." *Atwood v. Cox*, 88 Utah 437, 55 P.2d 377 (1936). While this term's connotation touches all matters concerning legal transactions, this discussion will be limited to its very broad meanings.

¹⁰See, e.g. 23 Words and Phrases (Perm. ed. 1958 Supp.) 357.

¹¹*Atwood v. Cox*, 88 Utah 437, 55 P.2d 377 (1936).

¹²21 C.J.S., Courts § 15.

¹³Miss. Code Ann. (1942). Judicial definitions and illustrations citing *Grenada Bank v. Petty*, 174 Miss. 415, 164 So. 316 (1935).

¹⁴*Grenada Bank v. Petty*, 174 Miss. 415, 164 So. 316 (1935).

¹⁵See, 23 Words and Phrases (Perm ed. 1958 Supp.), 357, where approximately fifty such terms are listed; e.g., active jurisdiction, admiralty jurisdiction, competent jurisdiction, concurrent jurisdiction, exclusive jurisdiction, extra-territorial jurisdiction, final jurisdiction, full jurisdiction, inherent jurisdiction, ordinary jurisdiction, original jurisdiction, Protestant-Episcopal jurisdiction, venue jurisdiction, etc.

¹⁶*American Historical Society v. Glenn*, 131 Misc. 291, 227 N.Y.S. 174 (1928). One text adds still another to this list. "The three essential elements of jurisdiction are: (1) The court must have cognizance of the class of cases to which the one to be adjudicated belongs; (2) the proper parties must be present; (3) the point decided must be in substance and effect within the issue." 21 C.J.S., Courts § 35.

B. Jurisdiction Of The Subject Matter

One needs to go no farther than the Mississippi decisions to find an excellent definition of the term 'jurisdiction of the subject matter'.¹⁷ As in the other definitions found in this article, the subject will be limited to only the definitions and not the legal ramifications that are involved. Speaking through Justice Gillespie the Court said:

"Jurisdiction of the subject matter is the power of the court to hear and determine cases of the general class to which the particular case belongs The subject matter means the nature of the cause of action and the relief sought. The jurisdiction of a Court is limited as to subject matter when it has not the power and determines all classes of cases."¹⁸

It is an undisputed rule of law that 'jurisdiction of the subject matter' cannot be waived nor granted by the parties, if the Court otherwise would not have such jurisdiction. Likewise, 'jurisdiction of the subject matter' can neither be diminished nor increased.¹⁹

C. Venue²⁰

A recent writer defined venue as ". . . the permissible place of commencing and maintaining suit" ²¹ However, historically, "venue" was the small locality from which jurors as witnesses of the fact for a trial in the Kings Court had to come;²² later, simply the county from which the jury was to come.²³ However, today it is not restricted to jury trials, but rather signifies the proper county, or district, in which a cause is to be tried.²⁴ Mississippi has adopted this view. In *Grenada Bank v. Petty*,²⁵ the Court, speaking through Justice Smith, said: ". . . venue connotes locality, the place where the suit should be heard". Technically speaking however, there is some doubt as to whether a court is vested with venue; there is authority that contends otherwise.²⁶

D. Venue v. Jurisdiction

These two terms, often misused, should be considered and distin-

¹⁷The legal texts and dictionaries could add nothing to the definition of this term that is given in *Duvall v. Duvall*, 224 Miss. 546, 80 So. 2d 752 (1955).

¹⁸*Ibid.*

¹⁹See Griffith, Mississippi Chancery Practice § 22; 14 Am. Jur., Courts §§ 22, 184.

²⁰"Entymologically, venue is from the Latin *venire*, to come; its meaning however, has been confused with the old French term *visne*, from the Latin *vicinia*, a neighborhood Properly *visne* suggests the idea of 'place'; *venue* the act of coming. Or if the idea of a locality is involved in both, *visne* the place where, *venue* the place whence." 67 C.J., Venue § 11.

²¹Dunn, "Venue in the Circuit Court," 29 Miss. L.J. 1 (1957).

²²*Hunt v. Pownall*, 9 Vt. 411, 10 Bacon ABr. 364.

²³*Hardenburgh v. Hardenburgh*, 115 Mont. 469, 146 P. 2d 151 (1944). "Anciently, a jury of one county could not try any matter arising in another county. A foreign county was almost as formidable a thing as a foreign country."

²⁴*Suhay v. Whiting*, 96 N.E. 2d 609 (Ohio 1950). "In modern phraseology, 'venue' means the place, whether it be the county or district wherein a cause is to be tried."

²⁵174 Miss. 415, 164 So. 316 (1935).

²⁶*Helmes v. District Court of Ramsey County*, 206 Minn. 357, 287 N.W. 875 (1939). The Court stated: "Venue as a matter of procedure does not arise until an action is started."

guished as many of the courts have done. Mississippi has recognized the conflict between the two terms and concluded by stating: "Jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard."²⁷ The Florida Supreme Court recognized a very clear distinction between the two when it said:

"The distinction between 'jurisdiction' and 'venue' is plainly established. 'Jurisdiction' is a term of comprehensive import. It concedes and defines the power of judiciaries and Courts. It embraces every kind of judicial action touching the subject of the action, suit, petition, complaint, indictment or other proceeding. It includes power to inquire into facts, to apply the law, to make decisions and to declare judgement. 'Venue' in its modern and municipal sense relates to and defines the particular county or territorial area within which the state or district in which the cause or prosecution must be brought or tried. It commonly has to do with geographical subdivisions. Relates to practice or procedure, may be waived, and does not refer to jurisdiction at all."²⁸

II. A LOOK AT MISSISSIPPI CASES USING THE TERM 'TERRITORIAL JURISDICTION'

In the case of *Heggie v. Stone*²⁹ the Court used the term 'territorial jurisdiction' in arriving at its decision. This suit was first tried before the Mayor of Vaiden who, by the town's charter, had been made an 'ex officio' Justice of the Peace for District Five of Carroll County, in which was located the corporate limits of Vaiden. Heggie sued Stone before the mayor on a cause of action that arose outside of the corporate limits of the town, but within district five. From a judgement in favor of the defendant, the plaintiff appealed to the circuit court which dismissed the case. On appeal to the Mississippi Supreme Court, Chief Justice Campbell wrote:

"... it was not within the power of the legislature to clothe the Mayor of a town comprising part of a district for the election of Justices of the Peace, with the official character and jurisdiction of a Justice of the Peace for the district outside of the town; and the charter of Vaiden which contains a provision making the Mayor ex officio a Justice of the Peace beyond the territory of the town, was as to that inoperative and void. Therefore, the case was not within the territorial jurisdiction of *this* Justice of the Peace." (Emphasis added).

It is apparent that the Court was referring simply to the geographical area in which a particular court can decide a case on its merits,³⁰ provided it has jurisdiction of the subject matter and jurisdiction of the person or property (depending on the type of action).

²⁷*Grenada Bank v. Petty*, 174 Miss. 415, 164 So. 316 (1935).

²⁸*McGown v. McGown*, 122 Fla. 394, 165 So. 274 (1939).

²⁹70 Miss. 332, 12 So. 253 (1892).

³⁰In *Heggie v. Stone*, 70 Miss. 332, 12 So. 253 (1892), the corporate boundary of the city was as far as the Mayor had 'territorial jurisdiction'. Within these boundaries he had full authority to decide all cases triable in a Justice of the Peace Court; provided it arose within said boundaries.

*Turner v. Williams*³¹ is a case in which the court apparently mis-used several legal terms. As a result this has developed much confusion that exists today regarding what the court is referring to when it uses the term 'territorial jurisdiction'. In this case suit was brought on an itemized account for \$57.59. Summons was issued for the defendant by the justice of the peace on July 25, 1929, but was made returnable on July 10, 1929. (note: returnable fifteen days prior to issuance). The defendant failed to appear, and judgement by default was rendered against him on August 10, 1929. From this judgement, the defendant appealed to the circuit court and moved to quash the process and dismiss for want of jurisdiction in the justice of the peace court, and therefore in the circuit court. This motion was overruled and thereupon, the cause was tried and a judgement in favor of the plaintiff resulted. From this judgement, the defendant appealed to the Mississippi Supreme Court which affirmed the decision of the circuit court.

This case is often cited when the issue of special and general appearances arises. This has already been exhaustively treated³² and will not be further discussed in this article. Justice Anderson speaking for the Court stated:

"The only question in the case for serious consideration is one of jurisdiction. The Justice of the Peace before whom the suit was brought had jurisdiction of the subject matter, and if the appellant had been properly served with process would have had territorial jurisdiction and jurisdiction of the person of the appellant."³³

What the Court was attempting to say by that statement is anyone's guess. It is a well settled proposition that in order for a court to be able to render an enforceable judgement, it must have (1) jurisdiction of the subject matter and (2) jurisdiction of the person or property.³⁴ If the defendant or property is outside of the limits of the court and he has not appeared, then a valid judgement cannot be rendered against him. A court is granted authority to decide cases within a certain geographical boundary. Service of process does not withdraw from a court its inherent power to decide certain types of actions; e.g., chancery court — divorces. Also, a defective service of process does not deprive a court of its right to decide causes that arise from the geographical area over which it may exercise its jurisdiction. For example, a municipal court has inherent power to decide all cases arising within the corporate limits of the city, provided it has jurisdiction of the subject matter of each case. In *Turner v. Williams*,³⁵ there apparently was no dispute as to the territorial limits of the justice of the peace court, in relation to either where the cause of action accrued or where the defendant resided. If in *Heggie v. Stone*³⁶ the court was referring to a geographical area over which a court could decide a case on its merits, as being within that court's 'territorial jurisdiction',³⁷ then it is submitted that this

³¹162 Misc. 258, 139 So. 606 (1923).

³²Comment, 19 Miss. L.J. 59 (1947).

³³*Turner v. Williams*, 162 Miss. 258, 139 So. 606 (1932).

³⁴An action in personam, or an action in rem.

³⁵162 Miss. 258, 139 So. 606 (1932).

³⁶70 Miss. 332, 12 So. 253 (1892).

³⁷*Supra* note 35.

right is inherent to the court. Thus, if 'territorial jurisdiction' is inherent, then it can neither be conferred nor withdrawn from a court by an invalid or valid service of process. The geographical area neither enlarges nor diminishes by a valid or an invalid service of process. Although the Court confuses 'territorial jurisdiction' in the second paragraph of the opinion of *Turner v. Williams*,³⁸ it is submitted that the Court is still following the meaning as applied in *Heggie v. Stone*, for in the final paragraph of the opinion, Justice Anderson stated: "As shown above this is a case³⁹ in which the Court had jurisdiction of the subject matter including territorial jurisdiction; there was only the lack of jurisdiction of the person and by appeal and appearance in the Circuit Court . . . the appellant waived the lack of process on him."⁴⁰ (Emphasis added).

It is submitted that the Court had 'territorial jurisdiction'—regardless of the service of process. It lacked jurisdiction of the person since the process was defective, but this was cured by the defendant appearing to answer. It is further submitted that the Court was only trying to add emphasis to the fact that the justice of the peace court could have rendered a valid judgement on the cause of action had there been a proper service of process. Instead, the Court confused the issue by stating: "The Justice of the Peace . . . had jurisdiction of the subject matter, and if the appellant had been properly served with process would have had territorial jurisdiction and jurisdiction of the person of the appellant."⁴¹ This statement is erroneous.

Arnett v. Carol C. & Fred R. Smith, Inc.,⁴² is recognized as a leading case on the subject of special appearances in Mississippi.⁴³ In rendering its decision, the Court stated: ". . . suitors in attendance in a Court outside of the territorial jurisdiction of their residence are immune from service of process . . ." According to this statement, one's immunity runs no further than the territorial jurisdiction of his residence. If this is true, then one would have to know where his residence's 'territorial jurisdiction' ends, so as to be protected from service of foreign process.

In the *Arnett* case the defendant, a resident of Alabama, had constructed a bridge in Itawamba County, Mississippi. During the construction, Arnett, an employee of the defendant, was allegedly killed during the course of his employment. The bridge was subsequently completed and the defendant moved back to Alabama. Seventeen days after the bridge was accepted by the Mississippi Highway Department, a summons for Fred R. Smith (individually) and Fred R. Smith & Carol C. Smith, Inc., was issued in a justice of the peace court in the city of Tupelo, Mississippi. Fred R. Smith appeared, and while attending the justice of the peace court, summons to appear in the circuit court to defend the action initiated by Arnett was served on him as vice-president of the corporation. At the next term of the Lee County Circuit Court the defendant filed a combined motion to quash the pro-

³⁸162 Miss. 258, 139 So. 606 (1932).

³⁹It arose within the court's geographical boundaries.

⁴⁰*Turner v. Williams*, 162 Miss. 258, 139 So. 606 (1932).

⁴¹Supra note 35.

⁴²165 Miss. 53, 145 So. 638 (1938).

⁴³See Comment, 19 Miss. L.J. 59 (1947).

cess and entered a plea in abatement. In granting the motion to quash the process, the Court, citing with approval 50 C.J. 548, declared: "suitors in attendance in a Court outside of the territorial jurisdiction⁴⁴ of their residence are immune from service of civil process, while attending court"

Apparently, the Court was relying on the same interpretation of 'territorial jurisdiction' as is found in *Heggie v. Stone*⁴⁵ — the geographical boundary of the court. Relying on this interpretation as correct, it is submitted that the Court misapplied the term, when it stated: "The injury complained of in this suit accrued in Itawamba County, in this State, but at the time the suit was filed in Lee County the corporation was not 'found doing business in the state . . .' and therefore, as against the appellant corporation, the Circuit Court of Lee County was without 'territorial jurisdiction' of the cause of action."⁴⁶ The Court was correct in its statement, but highly confusing in its choice of language and terms. There is no argument with the accepted fact that a corporation can be sued where it is found doing business in the state.⁴⁷ It may be sued either where the cause of action accrued or where it is found. Since no state court could have had jurisdiction over the corporation since it was no longer doing business in the state, then, a fortiori, there can be no 'territorial jurisdiction' of a circuit court of a different county. The Court could have used the term 'jurisdiction' alone and been more effective and much less confusing, for county boundaries had nothing to do with that interpretation.

Another example of the term 'territorial jurisdiction' being used to denote the area of the court rather than its power is found in *First Nat'l. Bank of St. Louis v. Mississippi Cotton Seed Product Co.*⁴⁸ In that case the plaintiff was attempting to attach a foreign corporation's property found in Mississippi, but attachment was prohibited by a federal statute. The Court stated that since (1) it was prevented from attaching the property found in the state due to a federal statute and, (2) the corporation was not found doing business in the state, the Court was without 'territorial jurisdiction'. This is exactly correct. The Court had jurisdiction of the subject matter (garnishment and attachment), but its authority extended no farther than the geographical limits of the court. Since the corporation was found not doing business in the state and no attachable property was found within the state, no state court could have 'territorial jurisdiction' of the defendant who was outside of the state.

The often cited case of *Lee v. Memphis Publishing Co.*,⁴⁹ turned

⁴⁴The Court quoted from 50 C.J., Process § 548. If they relied on this encyclopedia's rule regarding immunity from service of process, then they undoubtedly relied on Corpus Juris' interpretation of 'territorial jurisdiction', which is: "Territorial jurisdiction is the power of the tribunal considered with reference to the territory within which it is to be exercised . . ." 15 C.J., Courts § 728; also, "The tract of land or district within which a court, judge or magistrate has jurisdiction is called his 'territory' and his power in relation to his 'territory' is called his 'territorial jurisdiction.'" 15 C.J., Courts § 728, n. 29.

⁴⁵70 Miss. 332, 12 So. 253 (1892).

⁴⁶*Arnett v. Carroll C. & Fred R. Smith, Inc.*, 165 Miss. 53, 145 So. 638, 641 (1933).

⁴⁷Miss. Code Ann. § 1437 (1942).

⁴⁸171 Miss. 282, 157 So. 349 (1934).

⁴⁹195 Miss. 264, 14 So. 2d. 351 (1943).

on the question of whether or not the defendant was doing business in the state, and if not, did the court have 'jurisdiction' of the cause of action after the defendant entered court to plead the lack of 'jurisdiction'. The Court recognizing the problem stated:

"The defendant entered its appearance especially for the purpose of moving to dismiss the suit for want of jurisdiction, which action on its part did not operate as personal appearance so as to subject it to the *territorial jurisdiction* of the court . . ." (Emphasis added).

By its plea, the defendant raised (1) the question of want of 'territorial jurisdiction' of the courts of Mississippi on the ground that it was not doing business within the state, and (2) the want of venue of the suit in Webster County in the event that it should be held that service of process upon the secretary of state⁵⁰ could render it subject to suit in this state.

It is submitted that the Court meant that since the defendant was outside of the geographical area of the state, and not doing business within the state, it was outside of the court's 'territorial jurisdiction'. Further, the Court recognized that since the courts of Mississippi could have had 'territorial jurisdiction' if the defendant had been found doing business within the state; then the proper place of venue would have been where the secretary of state is found.

This article, thus far, has mainly dealt only with personal actions. However, the confusion that exists in the cases regarding property, both personal and real, should also be pointed out.

In *Lewis v. Sinclair*⁵¹ the plaintiff began an action of replevin in the justice of the peace court of district four of Pike County, seeking the recovery of certain personal property located in district three. The defendant resided in district three, and the property was in his possession. The defendant's property was seized, and a trial followed in the fourth district. From a judgment in favor of the plaintiff, the defendant appealed to the circuit court, where he moved to dismiss for *want of jurisdiction*. His motion was overruled and he appealed to the Mississippi Supreme Court. In reversing the circuit court, the Supreme Court stated: ". . . the action of replevin is a proceeding in rem and the Justice Court for District four was without *Jurisdiction* to hear the cause." Was the justice court without *Jurisdiction* or *venue*? A later case involving almost the same factual situation as *Lewis v. Sinclair*⁵² answers the question. In *Stanley v. Cruise*,⁵³ the Court stated: "The action of replevin is one in rem, and *venue* is not therefore a meer personal privilege which may be waived as is the case in an action in personam." In a personal action, lack of proper venue may be waived by appearance, but in an action in rem, improper venue cannot be waived.

Special attention should be given to the confusion of the terms that are found in the cases involving suits to confirm or remove clouds

⁵⁰Miss. Code Ann. § 1437 (1942).

⁵¹77 Miss. 603, 27 So. 611 (1900).

⁵²*Ibid.*

⁵³134 Miss. 542, 99 So. 376 (1924).

from real estate titles. The statute⁵⁴ fixing the venue of such actions seems self-explanatory, however, varied are the applications it has received. The statute states: "Suits to confirm title to real estate and suits to cancel clouds or remove doubts therefrom, *shall* be brought in the County where the land, or some part thereof is situated"⁵⁵ (Emphasis added). From the statute, it appears that the only court which has 'territorial jurisdiction' of an action to remove a cloud would be the court of the county in which the land or some part thereof is located. However, it is doubtful if such a statement is completely accurate.

In the case of *Ravesies v. Martin*,⁵⁶ the complainant brought suit to cancel a cloud on two tracts of real estate, one situated in Forrest County, and the other in Jasper County. The suit was brought in Forrest County, and at the time of the filing of the suit title to the land had matured to the state under a tax sale. The defendant demurred on the ground that the court was without "territorial jurisdiction" since title to the property in question situated in Forrest County was no longer in the complainant. The court failed to rule on the demurrer, and over the objection of the defendant heard the complainant's case. Upon the conclusion thereof, the defendant moved for a dismissal on the grounds that the court was without "territorial jurisdiction" and the complainant had failed to prove his case. The court sustained the motion on the latter ground. From this the complainant appealed, asserting that the chancellor was without "territorial jurisdiction" and for that reason he should have dismissed the case without prejudice rather than passing on its merits. The Supreme Court held that since the movant failed to raise the question of where the suit was filed, that "therefore, they have waived the point *if it be one of venue rather than jurisdiction.*" Apparently, the court meant that if the statute only regulated the venue of such actions, and not the "territorial jurisdiction" of the court, then it could be waived. The court further stated: ". . . this statute does not prescribe that *jurisdiction of the subject matter shall be dependent upon the land situated where the suit was filed.*" It appears that this is an incorrect statement. A court has "jurisdiction of the subject matter" when it has the power to hear cases of a particular nature and to grant the relief sought.⁵⁷ It is submitted that the chancery court has jurisdiction of the subject matter in all cases brought to quiet title to real estate, and such is never dependent upon where the land is situated. To further confuse the issue, the court states: ". . . in a suit *in personam*, the venue is a personal privilege which may be waived by failure of the defendant to claim it at a proper time, but in an action of replevin, being one in rem, the *venue is jurisdictional and may not be waived*" Sympathy is extended to the court in its dilemma on the choice of words. Our court has stated that "jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard."⁵⁸ Accepting this statement as true, it is error to say 'venue is jurisdictional.' Perhaps the court could have dis-

⁵⁴Miss. Code Ann. § 1274 (1942).

⁵⁵*Ibid.*

⁵⁶190 Miss. 92, 199 So. 282 (1940).

⁵⁷*Duvall v. Duvall*, 224 Miss. 546, 80 So. 2d 752 (1955).

⁵⁸*Grenada Bank v. Petty*, 174 Miss. 415, 164 So. 316 (1935).

pensed with the matter by stating that venue can be waived in actions in personam but cannot in actions in rem. The Supreme Court affirmed the lower court asserting that since the appellant had *invoked* and *insisted* on the court's 'jurisdiction', then they will not reverse for 'want of venue.' The Court stated that they followed the general rule, but that this case was 'quasi in rem'⁵⁹ and thus it could be waived:

"Therefore, a suit to cancel a claim against land as a cloud upon the title when the property is in possession of the complainant, and the court is not asked to make any disposition thereof, should not be held to be a proceeding purely in rem in the sense that a court would be wholly without jurisdiction in a county other than where the land is situated. *In other words, we think that the question here is one of venue only.*" (Emphasis added).

Apparently the statute controlling such action was not given effect, for the statute explicitly states: ". . . suits to cancel clouds (on real estate titles) . . . shall be brought within the county where the land or some part thereof is found" However, in this case, the land *was not found* within the county, but the decree of the chancellor was held valid. It is submitted that the chancery court of a given county does not have 'territorial jurisdiction' of a suit solely to cancel a cloud upon the title to land situated wholly in another county. However, *if the proceeding is other than one solely to cancel a cloud on the title, and the venue of the court is not challenged, or raised on appeal by the defendant*, then the decree of the lower court will stand, regardless of the fact that the land affected was not within the county. Therefore, the 'territorial jurisdiction' of the chancery court, in personal actions, extends to the boundaries of the state; the 'territorial jurisdiction' of local actions strictly in rem extends only to the geographical boundaries of the county, district, city, etc. However, if the actions be 'quasi in rem,' and the property does not have to be brought into court, then the 'territorial jurisdiction' of the chancery court extends to the boundaries of the state.

III. CONCLUSION

It is submitted that basically when courts use the term 'jurisdiction' alone, they are referring to the overall powers of the court. This term, when used alone, is all inclusive. When the courts use 'territorial jurisdiction,' they are referring to the geographical area over which the court has the power to hear and decide all cases arising therein, provided it has 'jurisdiction of the subject matter.' Thus, if for some reason the parties or property connected with a cause is not located within the area, even though the court might have the power to decide that type (jurisdiction of the subject matter) of case, its lack of 'territorial jurisdiction' will prevent its rendering an enforceable decision.⁶⁰ When the term 'venue' is used, it refers to the proper place a case should be heard. In other words,

⁵⁹The Court states that actions 'quasi in rem' are actions brought against persons where the real object is to deal with the particular property or to subject property to the discharge of claims asserted. *Ravesies v. Martin*, 190 Miss. 92, 199 So. 282 (1940).

⁶⁰*Heggie v. Stone*, 70 Miss. 332, 12 So. 235 (1892). This case is a perfect example of the proper application of the term. It clarifies any question as to what the Court is referring to when it uses this "Will-O-the Wisp territorial jurisdiction".

if the court does not have 'territorial jurisdiction', then it *cannot* have 'venue.' A court can have 'territorial jurisdiction,' but the suit may still be dismissed for improper venue. Lack of proper venue may be waived, while 'territorial jurisdiction' may never be waived.

Paul H. Holmes

RECENT DECISIONS

ADMINISTRATIVE LAW — REPARATIONS UNDER THE NATURAL GAS ACT

Federal regulation of the transportation and sale of natural gas in interstate commerce was established by the Natural Gas Act of 1938.¹ Unjust and unreasonable rates charged by a natural gas company² were thereby declared to be unlawful,³ and the Federal Power Commission (hereinafter referred to as the Commission) was given authority to fix and order just and reasonable rates to be charged in the future.⁴ By virtue of these provisions, the Commission in 1943 approved a rate of 25c per mcf being charged appellee by appellant, a natural gas company within the meaning of the Natural Gas Act. This rate remained in effect, and in 1948 appellee filed a petition with the Commission, contending that it was being charged an unjust, unreasonable, and discriminatory rate. In 1953 the Commission found that the gas supplied to appellee was interstate gas, although the greater part thereof was produced, transported, and sold wholly within the State of Mississippi. The Commission further found that the rate being charged by appellant was unjust, unreasonable, unduly discriminatory, and preferential. Upon these findings the Commission fixed a new rate of 17.5c per mcf to be charged in the future, but could not grant reparations. Appellee thereafter brought suit in the Chancery Court of Forrest County, Mississippi, praying that the court fix a just and reasonable rate for that portion of the gas supplied to appellee which was intrastate in character and award a decree for the difference in that rate and the amount actually charged from 1947 to 1953. Appellee's motion to strike appellant's motion to dismiss was sustained, and an interlocutory appeal was granted to the Mississippi Supreme Court. HELD: Reversed. No residual jurisdiction remained for independent court action, the jurisdiction of the Commission having attached to all natural gas sold to appellee. *United Gas Pipe Line Co. v. Willmut Gas & Oil Co.*, 97 So.2d 530 (Miss. 1958).

Rate-making must be conceded to be a legislative rather than a judicial function,⁵ and Congress has delegated that responsibility to the Commission in so far as the regulation of natural gas companies is concerned.⁶ Although the several states retain control of production facilities and the local distribution of natural gas,⁷ the Commission has

¹15 U. S. C. § 717 (1938).

²A natural gas company is defined as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U. S. C. § 717a (b).

³15 U. S. C. § 717c (a).

⁴15 U. S. C. § 717d (a).

⁵*Colorado Interstate Gas Co. v. Federal Power Comm'n.*, 324 U. S. 581 (1944); *Munn v. Illinois*, 94 U. S. 113 (1877); *Mississippi Power and Light Co. v. Memphis Natural Gas Company*, 162 F.2d 388 (5th Cir. 1947), cert. denied, 332 U. S. 770 (1947).

⁶15 U. S. C. § 717d (a).

⁷That Mississippi has no such control over any part of the gas in question, however, was clearly shown by the Supreme Court when it stated: "The commingled natural gas thus sold and delivered to Willmut was 'in interstate commerce' subject to the regulating power of the Federal Power Commission. And at Willmut's request the Federal Power Commission did assert its power over the entire sale of

exclusive authority with respect to the transportation and sale of gas in interstate commerce.⁸ A rate approved and fixed by the Commission is the only lawful rate which can be charged or accepted by a natural gas company, and it remains the only lawful rate until subsequently changed by the Commission.⁹ However, the Commission's authority is clearly limited to the determination of rates to be charged in the future,¹⁰ and it can not grant reparations or determine the lawfulness of past rates.¹¹ Although judicial review of a Commission order may be obtained,¹² such an inquiry may be made only as to the total effect of the order, and findings of fact by the Commission are conclusive if supported by substantial evidence.¹³ By interpretation of this section of the Natural Gas Act, the courts have reaffirmed the principle that rate-making is not a judicial function,¹⁴ and it cannot be denied that the granting of reparations by a court would necessarily require a determination of what the rate should have been in the past. Such action would clearly be substituting the judgment of the court for that of the Commission in direct opposition to the obvious intention of Congress in enacting the Natural Gas Act.¹⁵

The United States Supreme Court, in light of the above principles, has specifically recognized that a distributor which finds itself in the position of appellee here has no remedy to recover unjust and discriminatory rates charged in the past.¹⁶ Neither the Commission nor the courts have any authority to award reparations. While it may be contended that appellee's remedy lay in timely action in requesting a new

natural gas to Willmut." (Emphasis added). *United Gas Pipe Line Co. v. Willmut Gas and Oil Co.*, 97 So.2d 530 (1958).

⁸*Public Utilities Comm'n. of Ohio v. United Fuel Gas Co.*, 317 U. S. 456 (1942). State public service commissions are thus relieved of any authority to determine rate schedules for natural gas companies within the meaning of the Natural Gas Act.

⁹*Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1950); *Hope Natural Gas Co. v. Federal Power Comm'n.*, 134 F. 2d 287 (4th Cir. 1943), reversed on other grounds, 320 U. S. 591 (1943); *McClellan v. Montana-Dakota Utilities Co.*, 204 F.2d 166 (8th Cir. 1953).

¹⁰"... the Commission shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order." 15 U. S. C. § 717d (a).

¹¹*State Corp. Comm'n. of Kansas v. Federal Power Comm'n.*, 215 F.2d 176 (8th Cir. 1954); *McClellan v. Montana-Dakota Utilities Co.*, supra note 9; *Mississippi Power and Light Co. v. Memphis Natural Gas Co.*, supra note 5; *Hope Natural Gas Co. v. Federal Power Comm'n.*, supra note 9.

¹²An aggrieved party may obtain a review in the circuit court of appeals of the United States in the circuit in which the natural gas company is located or has its principal place of business, after a rehearing by the Commission. 15 U. S. C. § 717r (a) and (b).

¹³"Congress, to be sure, has provided for judicial review of the Commission's orders. But that review is limited to keeping the Commission within the bounds which Congress has created." *Colorado Interstate Gas Co. v. Federal Power Comm'n.*, supra note 5; "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Federal Power Comm'n. v. Hope Natural Gas Co.*, 320 U. S. 591 (1944); *City of Hastings, Nebraska v. Federal Power Comm'n.*, 221 F. 2d 31 (D.C. Cir. 1955); *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n.*, 143 F. 2d 488 (8th Cir. 1944).

¹⁴See *Federal Power Comm'n. v. Colorado Interstate Gas Co.*, 348 U. S. 492 (1955).

¹⁵See note 9 supra.

¹⁶*Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1950).

rate schedule, it has been recognized that such action would require instantaneous knowledge of a lower rate being charged by the natural gas company to another customer.¹⁷ In addition to this factor, such an appeal would require immediate action by the Commission in order to prevent damage to the petitioner. Whatever the reason may have been in the case at bar, appellee's petition which was filed in 1948 was not acted upon by the Commission until 1953, thus resulting in a five year delay in the re-scheduling of the rate charged by appellant. Is it not conceivable that a large backlog of petitions and the necessarily detailed investigations required for each have resulted and will continue to result in similar discriminatory and unjust charges, either in favor of the natural gas companies or the local distributors? Obviously, the only method of alleviating this situation is to amend the Natural Gas Act so as to give the Commission authority to determine the lawfulness of past rates and grant reparations in accordance with its findings. An amendment to this effect, giving the Commission authority similar to that of the Interstate Commerce Commission, would thus give distributors such as appellee an adequate remedy without deviating from the established principle and congressional intent that rate-making is essentially a legislative function.

Alfred Statham

CONSTITUTIONAL LAW — CONVICTION OF OFFENSE OF GREATER DEGREE
ON REVERSAL AS DOUBLE JEOPARDY

The defendant was indicted on two counts: arson and first degree murder. The jury was given instructions on both first and second degree murder. The defendant was found guilty of arson and second degree murder. He appealed the conviction of second degree murder,¹ and in ordering a new trial, the court warned him of the possible consequences of his successful appeal.² He was again indicted for first degree murder, and raised the plea of former jeopardy. This was overruled, and he was convicted of first degree murder. On appeal, the conviction was upheld,³ and the defendant appealed to the Supreme Court of the United States. HELD: Reversed. "A second trial . . . for first degree murder was contrary to both the letter and spirit of the Fifth Amendment." *Green v. United States*, 78 Sup. Ct. 221 (1957).

It was a maxim of the common law of England and the United States that no man could be retried if he had been convicted or acquitted of the same offense.⁴ This prohibition against second trials

¹⁷*Mississippi Power and Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir. 1947), cert. denied, 332 U.S. 770 (1947).

¹*Green v. United States*, 95 U. S. App. D. C. 45, 218 F.2d 856 (D.C. Cir. 1955).

²" . . . In seeking a new trial at which . . . the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty." 95 U. S. App. D. C. 45, 48, 218 F.2d 856, 859 (D.C. Cir. 1955).

³*Green v. United States*, 98 U. S. App. D. C. 413, 236 F.2d 708 (D.C. Cir. 1956).

⁴*Vaux's Case*, 4 Co. Rep. 44a, 45a. It was recognized that the pleas of *autrefois acquit* (former acquittal), and *autrefois convict* (former conviction) were good pleas to second prosecutions of the same offense.

extended not only to attempts by the state, but also to attempts by the defendant to secure a new trial.⁵ The prohibition against new trials was not strictly enforced, and at an early date, the right of the defendant to a new trial was asserted.⁶ Eventually this prohibition was expressly rejected, and it became accepted doctrine that a defendant could be retried for the same offense when his previous conviction had been set aside on his own motion.⁷ Realizing that this second trial had the effect of twice placing the defendant in jeopardy and violating the Fifth Amendment, the courts formulated two theories to explain their decisions. The majority of the courts adopted the "waiver" theory which stated that by appealing and obtaining a reversal of his conviction, the defendant has "waived" his right to the pleas of former or double jeopardy.⁸ The minority adopted the "continuing jeopardy" theory which reasoned that the defendant's original jeopardy had not ended until he was acquitted or his conviction had become final.⁹ It is true that the courts allowed a second trial for the same offense, but the question is—can a defendant be retried for a greater offense (first degree murder) when he appeals and obtains a reversal of a conviction of a lesser crime (second degree murder)? The first time this question was presented to the federal courts, it was answered in the affirmative. In that case the defendant was indicted for murder, convicted of manslaughter and appealed. In reversing the conviction, the court warned him that he might possibly be convicted of murder.¹⁰ Some years later the question arose in the Philippine Islands in a case which involved an acquittal in the lower court, and upon appeal by the state, the defendant was convicted in the higher court. The United States Supreme Court held the subsequent conviction to be a violation of the Fifth Amendment.¹¹ One year later, the question again arose in the Philippine Islands. The defendant was convicted of assault in the lower court, and upon his own appeal, he was convicted of homicide, a greater crime. The Supreme Court distinguished *Trono v. United States*,¹² from the case decided the year before, *Kepner v. United States*. The

⁵United States v. Gilbert, 25 Fed. Cas. 1287, No. 15,204, (C.C.D. Mass. 1834).

⁶United States v. Keen, 26 Fed. Cas. 686, No. 15, 510, (C.C.D. Ind. 1839). United States v. Harding, 26 Fed. Cas. 131, No. 15,301, (C.C.E.D. Penn. 1846).

⁷"It is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." United States v. Ball, 163 U. S. 662, 672 (1896).

⁸Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950).

⁹State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937).

¹⁰"... This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election or request Another jury instead of acquitting you altogether, may find you guilty of the whole indictment" U. S. v. Harding, 26 Fed. Cas. 131, 138, No. 15, 301, (C.C.E.D. Penn. 1846).

¹¹"We have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had been once put upon his trial for an alleged felony" Kepner v. United States, 195 U. S. 100 (1904).

¹²"The difference between that case and the one now before the Court is obvious The difference is vital between an attempt by the government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the judgment and asking for its reversal" Trono v. United States, 199 U. S. 521, 529, 530 (1905).

Court recognized that there were two theories regarding this question, but concluded that the better view was that a reversal obtained on the defendant's own motion opened the entire record, and that his retrial was not confined to the crime involved in the appeal.¹³ In the noted case the Court, relying heavily on portions of the *Kepner* case, rejected both the "waiver" and the "continuing jeopardy" theories, and concluded that the defendant could limit his waiver of the plea of double jeopardy to the crime involved in the appeal.

In allowing the defendant to limit his waiver, the Court has ruled contra to previously decided federal cases, and has extended the plea of double jeopardy to new limits. The Court chose to restrict the *Trono* case, to "its peculiar factual setting,"¹⁴ since it involved a case arising under the Spanish Procedure of Law, and thus it was considered inapplicable to cases arising under the American system. It is submitted that the aforementioned restriction was not correct.¹⁵ The decision in the noted case may be more in line with the early common law rule, but it is contra to the holdings of the federal courts and the majority of the state courts. Either by constitutional provision, legislative enactments or judicial interpretation, the majority of the state courts have seen fit to violate what the Supreme Court deems a "vital safeguard of our Society" by allowing a retrial for the greater offense.¹⁶ At one time, Mississippi espoused the "limited waiver" theory,¹⁷ but, due to a constitutional provision, Mississippi now allows a retrial of the greater offense.¹⁸ In handing down this decision, the Court has ignored the inherent difference in an appeal by the state, and an appeal by the defendant, and has distorted the meaning of the double jeopardy provision of the Fifth Amendment by giving to the defendant an unneeded advantage and ignoring the needs of society at large. It is suggested that perhaps the better view of the double jeopardy provision of the Fifth Amendment is that it was designed to protect the defendant from actions by the state, and was never intended to protect the defendant from the consequences of his own appeals.¹⁹

Harold D. Miller, Jr.

CONSTITUTIONAL LAW — RACIAL DISCRIMINATION BY LABOR UNION AS "STATE ACTION"

Two cases are noted herein. In Wisconsin, plaintiffs, two Negroes, sued to compel the masons and bricklayers' union to accept them as

¹³Id. at 533.

¹⁴*Green v. United States*, 78 Sup. Ct. 221, 228 (1957).

¹⁵"We may regard the question as thus presented as the same if it arose in one of the Federal courts in this country. . . ." *Trono v. United States*, supra note 12 at 530.

¹⁶*Green v. United States*, supra note 14 at 239. Brief for Appellants, pp. 47-54, *Green v. United States*, 78 Sup. Ct. 221 (1957).

¹⁷*Hunt v. State*, 25 Miss. 378, 59 Am. Dec. 225 (1853).

¹⁸Miss. Const., Art. III, § 22 (1890).

¹⁹"[T]he constitutional provision was really never intended to, and, properly construed, does not, cover the case of a judgment under these circumstances" *Trono v. United States*, 199 U. S. 521, 534 (1905).

members, alleging that the union's discrimination, based solely on grounds of race, violated the Fourteenth Amendment. In a Federal case, fourteen Negroes sued for admission to the Brotherhood of Locomotive Fire and Enginemen, alleging that the union's constitution, which denied them membership solely on grounds of race, violated their rights under the Fifth Amendment. HELD: The union's demurrer in the Wisconsin case was sustained because the court, under that state's Fair Employment Practices Act,¹ was not empowered to enforce judicially the State Industrial Commission's findings. *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957).² In the Federal case, heard on its merits, the union prevailed because there was insufficient federal action involved in its membership policies to be subject to judicial control. *Oliphant v. Locomotive Brotherhood*, 156 F. Supp. 89 (N.D. Ohio 1957).

The Federal Constitution has been raised as a protective shield against racial discrimination occurring through "state action", but it has been held inapplicable in discriminatory situations involving "private action."³ "State action" has been committed by a *state court* racially discriminating against Negroes in the selection of juries,⁴ and in the enforcement of restrictive covenants relating to the use of land;⁵ and, by a *state legislature* making racial distinctions in the requirements for jury duty,⁶ for voting rights,⁷ for engaging in a trade,⁸ and for practicing a profession.⁹ Similarly, *state officials*, implementing state legislation otherwise valid on its face, have committed "state action" where jury commissioners excluded Negroes in their selections,¹⁰ where a sheriff beat a Negro prisoner who died from the beating,¹¹ where a policeman excluded a Negro from privately owned recreation center,¹² and where a policeman assisted a bus driver in ejecting a Negro who refused to take a rear seat.¹³ The activities of *municipalities* have likewise been prescribed as "state action" in cases where an ordinance restricted the right to purchase, sell and use real property,¹⁴ and denied Negroes access to public recreational facilities, even where separate but equal facilities were available.¹⁵ Where a municipal agency, acting in a fiduciary capacity, refused to admit Negroes to a college in ac-

¹Wis. Stat. Ann. §§ 111.31 et. seq. (1955).

²Justice Fairchild dissented.

³Civil Rights Cases, 109 U.S. 3 (1883). Justice Harlan dissented, contending that the Fourteenth Amendment gives Congress the power to protect citizens of the several states, who are citizens of the United States, from all discrimination founded on race, color or previous condition of servitude.

⁴Ex Parte Virginia, 100 U.S. 339 (1880).

⁵Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953); Clifton v. Puente, 218 S.W. 2d 272 (Tex. Civ. App. 1949).

⁶Strauder v. West Virginia, 100 U.S. 303 (1880).

⁷Nixon v. Herndon, 273 U.S. 5361 (1927).

⁸Chaires v. Atlanta, 164 Ga. 755, 139 S.E. 559 (1927).

⁹Alston v. School Board of Norfolk, 112 F.2d 992 (4th Cir. 1940).

¹⁰Neal v. Delaware, 103 U.S. 370 (1880). But see Torrence v. Florida, 188 U.S. 519 (1903).

¹¹Screws v. United States, 325 U.S. 91 (1945).

¹²Valle v. Stengel, 176 F.2d 697 (3rd Cir. 1949).

¹³Whiteside v. Southern Bus Lines, 177 F.2d 949 (6th Cir. 1949).

¹⁴Buchanan v. Warley, 245 U.S. 60 (1917); Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

¹⁵Mayor and City of Baltimore v. Dawson, 350 U.S. 877 (1956).

cordance with the provisions of a private trust, "state action" was found.¹⁶ There is a line of authority supporting the proposition that *state inaction* amounts to "state action", as for example the failure to provide Negroes the facilities for legal training,¹⁷ and the failure to protect Negro prisoners from mob action.¹⁸ Even some behavior of *private persons*, corporate and non-corporate, has come within the definition of "state action", as where a corporation leased public lands excluding Negroes;¹⁹ a privately owned town forbade the distribution of religious literature;²⁰ and, political parties, controlling the primary election machinery of the state, denied Negroes the ballot.²¹

Although some private associations have not been exempt from inclusion within the concept of "state action", labor unions, regarded as voluntary private associations,²² have generally been allowed complete control of their membership.²³ Courts have forced unions to take in members where there is a combination of a union shop and a closed union;²⁴ and, the U.S. Supreme Court has interpreted both the Railway Labor Act²⁵ and the National Labor Relations Act²⁶ so as to require unions, chosen to represent employees in a given craft or bargaining unit, to be open to *all* employees therein. In the *Steele* case,²⁷ the Court held that the union must conform to the requirements of the Fifth Amendment since its powers were derived from Congress, yet the Court did not expressly hold the discriminatory action of the union to be "state action". The Court's language is stronger, however, in the cases of *Betts v. Easley*,²⁸ where the union was regarded as an agent of the U. S. Government, and *American Communications Assn. v. C.I.O.*,²⁹ where it was said the union was clothed with powers comparable to that of a legislative body.

¹⁶*Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Norris v. Mayor and City of Baltimore*, 78 F.Supp. 451 (D.C. D. Md. 1948). Contra, *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945).

¹⁷*Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹⁸*Lynch v. United States*, 189 F.2d 476 (5th Cir. 1951).

¹⁹*Tate v. Dept. of Conservation and Development*, 133 F.Supp. 53 (E.D. Va. 1955). But see *Kern v. City Commissioners of Newton*, 151 Kan. 565, 100 P.2d 709 (1940); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541, 554 (1949); *Harris v. St. Louis*, 233 Mo. App. 911, 111 S.W.2d 995 (1938); *Easterly v. Dempster*, 112 F. Supp. 214 (E.D. Tenn. 1953).

²⁰*Marsh v. Alabama*, 326 U.S. 501 (1946).

²¹*Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947); *Terry v. Adams*, 345 U.S. 461 (1952).

²²*Mayer v. Journeyman Stonecutters Assn.*, 47 N.J. Eq. 519, 20 A. 492 (1890); *Frank v. Nat'l Alliance of Bill Posters*, 89 N.J.L. 380, 99 A. 134 (1916); *Greenwood v. Building Trades Council*, 71 Cal. App. 159, 233 P. 823 (1925); *Thorn v. Foy*, 328 Mass. 337, 103 N.E. 2d 416 (1952); *Wilson v. Hacker*, 101 N.Y.S. 2d 461 (1950); *Yeager v. Teamsters Local 313*, 39 Wash. 2d 807, 239 P.2d 318 (1951).

²³*Maguire v. Buckley*, 301 Mass. 355, 17 N.E.2d 170 (1938); *Kelly v. Simons*, 87 N.Y.S. 2d 767 (1949).

²⁴*Dorington v. Manning*, 135 Pa. Super. 194, 4 A.2d 886 (1939).

²⁵44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1952). *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Railway Trainmen*, 323 U.S. 210 (1944).

²⁶49 Stat. 449 (1935), as amended 45 U.S.C. §§ 141-66 (1952), amended by Taft-Hartley Act, 61 Stat. 136 (1947), as amended 29 U.S.C. §§ 141-44 (1952); *James v. Marins Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944).

²⁷*Supra* note 25.

²⁸161 Kan. 459, 169 P.2d 831 (1940).

²⁹399 U.S. 382, 401-02 (1949).

A trend, as manifested by the *Allwright*, *Marsh* and *Elmore* cases,³⁰ has clearly emerged in the U. S. Supreme Court decisions delimiting, under the Constitution, the racially discriminatory practices of private associations. And, although there has been no enactment of federal legislation specifically prohibiting discrimination, approximately one-third of the states have enacted anti-discriminatory legislation or have incorporated such measures in their state labor relations acts.³¹ The conclusion, therefore, that racial discrimination by labor unions might be held "state action" in the future does not appear unwarranted. Unions derive their existence from either state or federal legislation; elections are held at the public's expense; there is government certification of a union as an exclusive bargaining agent; and there is statutory compulsion of the employer to bargain with the certified union.

W. O. Mayfield

CONSTITUTIONAL LAW — CONVICTION WITHOUT KNOWLEDGE
OF CRIMINAL STATUTE — UNCONSTITUTIONAL DENIAL OF DUE PROCESS

Petitioner Lambert was convicted of violating the Los Angeles felon registration ordinance.¹ The ordinance carried criminal penalties, and did not include knowledge of a duty to register as a requisite for conviction. The trial court refuted the objection that the registration provisions were a denial of due process of law.² Appellant was fined \$250 and placed on probation for three years. The Appellate Department of the Superior Court of California affirmed the conviction. Certiorari was granted by the United States Supreme Court. *HELD*: Reversed. "Where a person did not know of the duty to register and where there was no proof³ of the probability of such knowledge, he may not be convicted consistently with Due Process." *Lambert v. State of California*, 78 Sup. Ct. 240 (1957).

During the nineteenth century it was the individual interest which held the stage; the criminal law machinery was overburdened with innumerable checks to prevent possible injustice to individual defendants. In the twentieth century, courts are thinking more of the protection of social and public interests. This later emphasis has necessarily fostered the growth of regulatory statutes which prescribe criminal penalties. Heretofore, the legislature has been given wide discretion⁴ in creating public welfare offenses⁵ which have no counterpart in the

³⁰Supra notes 20 and 21.

³¹4 Labor Rel. Reporter 1:1.

¹Los Angeles Municipal Code § 52.39, "It shall be unlawful for any person . . . convicted of an offense punishable as a felony . . . to remain in Los Angeles for a period of more than five days without registering . . ."

²U.S. Const. amend. XIV.

³Appellant's offer of proof with regard to lack of knowledge had been refused in the trial court, thus the reviewing court assumed that defendant had no knowledge of the registration ordinance.

⁴Chicago, B. & Q. R. Co. v. United States, 220 U.S. 578 (1911).

⁵The phrase "public welfare offenses" appears to have been coined in the widely-cited article, Sayre, "Public Welfare Offenses", 33 Colum. L. Rev. 55 (1933). Based on a study of a half-century of decisions, Sayre divides the offenses punish-

common law. Such statutes are enacted for the protection of public morals, public health, public peace, and public safety⁶ under the police power which is one of the least limitable powers of local government.⁷ Statutes enacted that make no mention of intent are generally construed as having dispensed with it, and the doing or omission of the act prohibited constitutes the violation regardless of the knowledge or intent of the offender.⁸

It has been a long-standing rule that the requirement of due process is not violated merely because knowledge or wilfulness is not a required element of the prescribed crime.⁹ The punishment of a person for an act, done innocently or in good faith, does not deny due process, especially where the emphasis of the statute is evidently on some social betterment rather than punishment of a crime *malum in se*.¹⁰ The *Shevlin-Carpenter Co.*¹¹ and *Balint*¹² cases firmly established this necessary rule, which has been periodically re-affirmed.¹³

There are no prior decisions¹⁴ that substantiate the majority opinion of the noted case.¹⁵ Justice Douglas distinguished this case from earlier decisions which established that convictions without knowledge of a criminal statute (public welfare offense) were not a denial of due process by pointing out that Lambert's conduct was passive—failure to register. Since the registration ordinance made criminal an act morally innocent, there was an absence of the usual notice accompanying active conduct that "should alert the doer to the consequences of his deed."¹⁶ Such conviction was deemed unconstitutional. The only authority cited in support of the decision was Holmes, *The Common Law*.

able without wrongful intent into eight groups: (1) Illegal sales of intoxicating liquor; (2) Sale of impure or adulterated food or drugs; (3) Sale of misbranded articles; (4) Violations of anti-narcotic acts; (5) Criminal nuisances; (6) Violations of traffic regulations; (7) Violations of motor vehicle acts; (8) Violations of general police regulations, passed for the safety, health, or well being of the community.

⁶*People v. Reznick*, 75 Cal. App. 2d 832, 171 P.2d 956 (1946).

⁷*District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909).

⁸*Feeley v. United States*, 236 Fed. 903 (8th Cir. 1916); *People v. Roby*, 52 Mich. 579, 18 N.W. 366 (1884); *United States v. Thirty-Six Bottles of London Dry Gin et al.*, 210 Fed. 271 (3rd Cir. 1914).

⁹*Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 68 (1910). This decision was the first in which the Supreme Court rendered a decision on the precise question at hand.

¹⁰*United States v. Balint*, 358 U.S. 250 (1922). The court pointed out that scienter was a requirement in common law crimes, but stated that wrongful intent is not an essential element in many statutory crimes.

¹¹See note 9 *supra*.

¹²See note 10 *supra*.

¹³*United States v. Behrman*, 258 U.S. 280 (1922); *United States v. Dotterweich*, 320 U.S. 277 (1943); *Williams v. State of North Carolina*, 325 U.S. 238 (1945).

¹⁴Appellant relied heavily on the 1952 decision of *Moresette v. United States*, 342 U.S. 246 (1952), as supporting his contention that the element of wrongful intent cannot constitutionally be eliminated as an ingredient of the offense. The majority opinion in the present action was careful not to cite this decision inasmuch as the court there was considering the question of whether wrongful intent may be eliminated from crimes of common law origin.

¹⁵This was a 5-4 decision. Justices Frankfurter, Burton, Harlan, and Whitaker dissented.

¹⁶78 Sup. Ct. at 243.

There are countless thousands of statutes that provide for conviction regardless of the moral innocence of the particular non-feasance. These statutes were deemed necessary by the legislature to protect the public interests of modern society. The element of knowledge was purposely eliminated as a requisite for conviction since it is virtually impossible in most cases to prove that the defendant knowingly violated the law.¹⁸ A likely result of this decision is to make potential violators strive never to be in a position that would suggest knowledge of the existing law. This adverse effect could have been avoided by declaring that this particular conviction was a cruel and unusual punishment;¹⁹ or that knowledge of the law's command was impliedly an element necessary for conviction under the terms of the Los Angeles registration ordinance; or, finally, the most desirable ruling would have been that such statutes are not a denial of due process. Instead, the due process clause of the 14th Amendment has been expanded to protect all passive violators of public welfare offenses that provide for criminal penalties without including knowledge as an element of conviction.

Dewitt T. Hicks, Jr.

CONSTITUTIONAL LAW — RIGHT OF EACH STATE TO PRESCRIBE
THE PROCEDURE NECESSARY TO RAISE A CONSTITUTIONAL ISSUE

Appellant was convicted in the Mayor's Court of the City of Baxley, Georgia, of violation of a city ordinance and was sentenced to imprisonment for 30 days or to pay a fine of \$300. The ordinance provides that anyone who seeks to solicit members for any organization requiring the payment of dues shall first apply to the Mayor and Council of Baxley for a permit to carry on such solicitation. The ordinance further provides a detailed procedure for making the application, standards for granting the permit, the fee to be charged, and sanctions for failure to comply with the ordinance. By a plea in abatement appellant attacked the ordinance as in conflict with provisions of the State and the United States Constitutions and with the National Labor Relations Act.¹ Her plea was overruled, and the cause proceeded to trial. The undisputed evidence established that appellant was an employee of the International Ladies' Garment Workers Union, an organization that required dues of its members, that she was soliciting members for the union in Baxley, and that she had not applied for a permit as required by the city ordinance. After being convicted in the Mayor's Court, appellant applied to the superior court of the county for a writ of certiorari, repeating the contentions she had made in her plea in abatement. The cause was tried de novo by the court without a jury and the judgment of the mayor's court was affirmed. On writ of error,

¹⁷Holmes, *The Common Law* at 50: "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for the community to bear."

¹⁸*United States v. Greenbaum*, 135 F.2d 438 (3rd Cir. 1943).

¹⁹U.S. Const. amend. VIII and XIV.

¹⁶¹Stat. 136 (1947), 29 U. S. C. 151-167, amending 49 Stat. 449 (1935).

the Georgia Court of Appeals noted that appellant had made no effort to secure a permit and that her constitutional attack should have been made specifically against a particular section or sections of the ordinance and not against the ordinance as a whole. On this doctrine of Georgia appellate procedure the court cited *Anthony v. City of Atlanta*, 66 Ga. App. 504, 18 S. E. 2d 81 (1941), and concluded that the issue of the constitutionality of the ordinance had not been properly raised. Accordingly, the Court of Appeals sustained the conviction. The Supreme Court of Georgia denied appellant's application for a writ of certiorari, and the case was carried to the Supreme Court of the United States. **Held:** Reversed and remanded. The ordinance, on its face, is unconstitutional. *Staub v. City of Baxley*, 78 Sup. Ct. 277 (1958).

It cannot be denied that the right of peaceful assembly to discuss the affairs of workers or of unions and to solicit support is as fully protected by the Constitution as is the right of businessmen, farmers, educators, or political party members to assemble and discuss their affairs and to enlist the support of others.² The only question brought into focus here is the right of each state to prescribe the procedure by which a constitutional issue may be raised. The Supreme Court of Georgia has construed Georgia Code Annotated (1935), Section 81-101,³ as requiring that the following three things be shown in order to raise a question as to the constitutionality of a law: (1) the statute, or particular part or parts of a statute which the party would challenge, must be stated or pointed out with fair precision; (2) the provision of the Constitution which it has claimed has been violated must be clearly designated; and, (3) it must be shown wherein the statute or some designated part of it, violated such constitutional provision.⁴ In following this interpretation the Georgia Supreme Court has pointed out in case after case that it is necessary to state definitely what section of an ordinance is unconstitutional in order to raise any question of its constitutionality.⁵ This doctrine finds a reasonable basis in the fact that all sections of an ordinance are not necessarily unconstitutional merely because one or more sections may be plainly so. The Supreme Court of the United States has repeatedly held that the interpretation placed by the highest court of a state on a statute of that state is binding on the United States Supreme Court;⁶ and it has required only that such procedural statute give the litigant a reasonable opportunity to have the con-

²*Thomas v. Collins*, 323 U. S. 516 (1945).

³"All suits in the superior courts for legal or equitable relief or both shall be by petition addressed to the court, signed by the plaintiff or his counsel, plainly, fully, and distinctly setting forth the cause of action, legal or equitable or both, the manner of the persons against whom process is prayed, and the demand for legal or equitable relief or remedy or both."

⁴*Flynn v. State*, 209 Ga. 519, 74 S. E. 2d 461 (1953).

⁵*Inlow v. State*, 168 Ga. 377, 147 S. E. 881 (1929); *City of Macon v. Anderson*, 155 Ga. 607, 117 S. E. 753 (1923); *Wadley v. McCommon*, 154 Ga. 420, 114 S. E. 357 (1922); *City of Atlanta v. Standard Life Ins. Co.*, 149 Ga. 501, 101 S. E. 122 (1919); *Dobbs v. Bullard*, 149 Ga. 553, 101 S. E. 122 (1919); *Harris v. State*, 147 Ga. 489, 94 S. E. 572 (1917); *Rooks v. Tindall*, 138 Ga. 864, 76 S. E. 378 (1912); *Carswell v. Wright*, 133 Ga. 714, 66 S. E. 905 (1910); *Griggs v. State*, 130 Ga. 16, 60 S. E. 103 (1908).

⁶*Morey v. Doud*, 354 U. S. 457 (1957); *Albertson v. Millard*, 345 U. S. 242 (1953); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94 (1952); *Watson v. Buck*, 313 U. S. 387, 136 A. L. R. 1426 (1941).

stitutional issue determined by the state court.⁷ A state may provide that an appeal in which the validity of a statute is involved shall be taken to a particular appellate court.⁸ Why then may it not require that invalid sections of an allegedly unconstitutional statute be attacked specifically? Neither of these purely procedural regulations are unfair, unreasonable, or obstructive of any federal right.

There is no valid reason to withdraw from the states the right to prescribe the jurisdiction of their appellate courts, the mode and time of invoking that jurisdiction, or the rules of practice to be applied in its exercise, and the Supreme Court has generally declined to decide whether constitutional rights have been violated where the federal question was not seasonably raised in accordance with reasonable requirements of state law.⁹

Elzy J. Smith, Jr.

FEDERAL TAX LIENS — EFFECT OF NON-JUDICIAL SALE UNDER A PRIOR
RECORDED DEED OF TRUST — TO EXTINGUISH

This is an appeal from a decision of the United States District Court, Northern District of Mississippi, to the United States Court of Appeals, Fifth Circuit. The original action was brought by the United States under Section 7403 of the Internal Revenue Code of 1954¹ to foreclose a tax lien upon certain real property belonging to one Boyd. On December 1, 1952, there was filed for record a valid first deed of trust in favor of the Prudential Life Insurance Company to secure a debt. Subsequently, assessment lists were received by the Collector of Internal Revenue in Jackson which were filed for record between May, 1953 and April, 1954. Such receipt and recordation fixed the effective date of the Government's lien as against the tax debtor and determined its rank to be junior to that of the mortgagee. No further action was taken by the Government until this suit was filed on May 28, 1956. The Government prayed that its lien be determined, enforced, and foreclosed as prior and paramount except as to the lien of the mortgagee. Prior to the filing of the suit, the mortgagee had begun proceedings in accordance with Mississippi statutes² to foreclose the deed of trust by publicly advertising the sale which was to be held June 22, 1956. The property was sold on that date to Bradley Lumber Company. The District Court held that the lien of the United States should be recognized and enforced but then granted the Government a right of redemption.³ The government appealed claiming that the foreclosure

⁷*Michel v. State of Louisiana*, 350 U. S. 91 (1955); *Parker v. People of State of Illinois*, 333 U. S. 571 (1948); *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U. S. 287, 132 A. L. R. 1200 (1941), rehearing denied 312 U. S. 715 (1941).

⁸*Central Union Telephone Co. v. City of Edwardsville*, 269 U. S. 190 (1925).

⁹*Edelman v. People of State of California*, 344 U. S. 357 (1953).

126 U.S.C. § 7403.

²Miss. Code Ann. §§ 888.892 (1942).

³The judgment is confusing in this respect because there is no right of redemption in the government under state law but one is granted to the government whenever a sale of real estate is made to satisfy a lien prior to that of the United

of the deed of trust by the mortgagee did not affect the tax lien in any manner; that Section 7403⁴ makes it mandatory that the court grant a decree of foreclosure; that judicial decree and sale is the only method by which a federal tax lien may be extinguished. **Held:** Affirmed. When a mortgage has been validly foreclosed by a non-judicial sale under a power granted by the mortgagor in a deed of trust, it cuts off all junior liens, including those of the Government. *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957).

If any person liable to pay taxes shall refuse, the amount becomes a lien in favor of the United States upon all property, both real and personal, belonging to such person.⁵ To be valid as against a mortgagee, pledgee, purchaser, or judgment creditor, notice of the lien must be filed with the officer designated by the law of the state in which the property is situated.⁶ In Mississippi, notice of the lien must be filed with the chancery clerk of the county in which the property is situated.⁷ The United States may become a party to a suit involving federal income tax liens under various provisions of the Internal Revenue Code of 1954.⁸ Section 2410 of the Code waives sovereign immunity to suit on these causes.⁹ Section 7424 provides procedures to be followed by lienholders in obtaining a hearing in a federal district court for a final determination of all liens or claims to or liens upon the property in question—to clear title to the property.¹⁰ Section 7403, under which the principal case was brought, gives the United States power to institute a civil action in the district court to enforce the tax liens of the United States.¹¹ Subsection (b) of Section 7424 states that the court, under this provision, shall proceed to adjudicate the matters involved in the same manner as in the case of actions filed under Section 7403.¹² Thus, it will be noted that there is a close relationship between these two sections which will precipitate the inconsistencies contained in the plaintiff's contentions in the principal case and demonstrate the fall-

States. 28 U.S.C. § 2410. The Court of Appeals states that this means “. . . from the express reservation of a right to redeem that the Court did, and meant to, hold that the mortgage foreclosure sale otherwise extinguished the Government's lien. *United States v. Boyd*, 246 F.2d 477,480 (5th Cir. 1957).

⁴26 U.S.C. § 7403.

⁵26 U.S.C. § 6321 (a).

⁶26 U.S.C. § 6323 (a) (1).

⁷Miss. Code Ann. § 893 (1942).

⁸See 26 U.S.C. §§ 7403,7424; 28 U.S.C. § 2410.

⁹*Wells v. Long*, 162 F.2d 842 (9th Cir. 1947).

¹⁰26 U.S.C. § 7424.

¹¹“(a) Filing.—In any case where there has been a refusal to pay any tax . . . The Attorney General . . . may direct a civil action to be filed in a district court of the United States . . . with respect to such tax . . . or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest to the payment of such tax

“(b) Parties.—All persons having liens upon or claiming any interest to the property involved in such action shall be made parties thereto.

“(c) Adjudication and decree.—The court shall . . . proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States is established, may decree a sale of such property . . . and a distribution of the proceeds . . . according to the findings of the court in respect to the interests of the parties and of the United States. 26 U.S.C. § 7403. (Emphasis added).

¹²“(b) Adjudication.—Upon filing of such civil action the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403” 26 U.S.C. § 7424.

acy in plaintiff's supporting case law.¹³ Statutes in Mississippi provide for the public sale of land foreclosed under a deed of trust, and for advertisement of the sale for three consecutive weeks immediately preceding the date of the sale.¹⁴ Other statutes provide for an equity of redemption in the debtor or in any interested party at any time before the sale is made.¹⁵ A valid sale, however, cuts off the equity of redemption.¹⁶ It is universally acknowledged that "... a purchaser takes the mortgagor's title divested of all encumbrances made since the creation of the power."¹⁷ In order to avoid these consequences and strengthen the government's taxing remedies, Congress provided in Section 2410¹⁸ that the United States should have a right of redemption for one year from the date of the sale of the property.

Principal support voiced by the plaintiff is a decision of the Court of Appeals, Sixth Circuit.¹⁹ In that case, the court held that the only method by which a lien of the Government could be *extinguished* was by foreclosure and sale. The court in the principal case attacks the result and reasoning saying that the premise that an action under Section 2410 or 7424 is one to extinguish a lien is unsound. The court reasoned that the proceeding is really a determination that a tax lien does not exist, has been extinguished, or is inferior in rank.²⁰ This view seems to be in accord with the language of the statute which gives the courts power to "... adjudicate all matters . . . and finally determine the merits of all claims" ²¹ Thus, the problem emerges. Under the *Metropolitan* decision, a purchaser utilizing Section 7424 to clear his title, or a defendant purchaser in a Section 7403 proceeding must automatically concede defeat to the United States even though it is a junior encumbrancer. If the doctrines of *Metropolitan* are followed, a foreclosure and sale will result in every instance. This, in itself, is contrary to the holding of *United States v. Morrison* where it is said that the court must exercise the traditional flexibility of the chancellor.²² Purchasers, under the *Metropolitan* case, would become remediless—unable to become *bona fide* purchasers at a non-judicial sale. It appears to be clear that the lien of the Government was not *extinguished* by the district court, instead it merely determined that the Government lien *had already been extinguished* by the sale pursuant to the power. Congress, in formulating Section 2410(c) which gives the Government a

¹³*Metropolitan Life Ins. Co. v. United States*, 107 F.2d 311 (6th Cir.1939), cert. denied 310 U.S. 630 (1940). For comprehensive analysis and criticism of this case see Note, 49 Yale L.J. 1106 (1940), and, Clark, "Federal Tax Liens and Their Enforcement", 33 Va. L.Rev. 13,32-38 (1947).

¹⁴Miss. Code Ann. § 888 (1942).

¹⁵Miss. Code Ann. § 892 (1942).

¹⁶See, e.g., *Dibrell v. Carlisle*, 48 Miss. 691 (1873).

¹⁷3 Jones on Mortgages 975 (1928).

¹⁸28 U.S.C. § 2410.

¹⁹See note 13 *supra*.

²⁰*United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957).

²¹See note 11 *supra*.

²²*United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957). This is a proceeding under 28 U.S.C. § 2410 in which the same criticism of the *Metropolitan* case is contained. Accord: *United States v. Ryan*, 124 F. Supp. 1 (D.C. Minn. 1954); *Trust Co. of Texas v. United States*, 3 F. Supp. 683 (S.D. Tex. 1933); *Minnesota Mutual Life Ins. Co. v. United States*, 47 F.2d 942 (N.D. Tex. 1931); *Oden v. United States*, 33 F.2d 553 (W.D. La. 1929).

right of redemption, seemingly anticipated that there would be instances where judicial foreclosure would not be forthcoming. If the procedure advocated by the Government were followed, there would be no need for a right of redemption in the government. To allow the Government to arrogate to itself a lien, attaching to a destructible property interest, which will survive the destruction of the interest of the tax debtor, is to vest in the government a status unavailable to any other creditor.²³ Such was not the intention of Congress in passing Section 6323 which plainly was intended to provide a system of absolute priorities among mortgagees, pledgees, purchasers, or judgment creditors in their relations with the Government as a lienholder. Considerations of public policy should enter into the resolution of this conflict between the decisions of the Courts of Appeals; more especially the damaging effect that the *Metropolitan* decision would have on the use of the deed of trust as a credit instrument.²⁴ The Government has petitioned the United States Supreme Court for a writ of certiorari which should be decided very soon. Should the Supreme Court grant the writ, it is likely that the procedures now in use under deeds of trusts will be vindicated and the Fifth Circuit decision upheld.²⁵

M. Curtiss McKee

MALICIOUS PROSECUTION — WHAT CONSTITUTES TERMINATION

The defendant made an affidavit charging that the plaintiff possessed stolen property which belonged to the defendant's labor union. Plaintiff was arrested pursuant to the affidavit, and a justice of the peace, without lawful authority, undertook to bind the plaintiff over to the county court without conducting a preliminary hearing. Plaintiff was fully discharged in habeas corpus proceedings, and defendant did nothing further to press the charges against the plaintiff. Plaintiff now brings an action for malicious prosecution. HELD: Affirmed. For all intents and purposes the criminal prosecution had been terminated prior to the filing of the instant suit for damages. *Conn v. Helton*, 99 So.2d 646 (Miss. 1958).

That there must be a final termination of the criminal prosecution or civil action¹ in favor of the defendant in such proceeding before an action for malicious prosecution may be had is everywhere accepted as the general rule.² It seems the reason for such a rule lies in the fact

²³*Jackson v. Lawrence*, 117 U.S. 679 (1886).

²⁴See *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957) at 484, 485, for a convincing summary of public policy arguments in support of the principal holding.

²⁵Since the completion of this note the United States Supreme Court has denied the Government's petition for a writ of certiorari in the principal case. *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957), cert. denied 78 Sup. Ct. 261 (1957). Certainly no substantive conclusion may be drawn from a memorandum decision, therefore, the conclusions reached in the note remain unchanged.

¹This note is concerned only with termination in criminal prosecutions, even though the rules herein outlined may apply equally to civil actions in many jurisdictions.

²*Grenada Bank v. Petty*, 174 Miss. 415, 164 So. 316 (1935); *Jaffe v. Stone*, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775 (1941).

that if the accused is convicted or judgment is rendered against him, the action or prosecution was brought with probable cause.³ The only difficulty with the rule lies in its application. Courts have differed as to what constitutes a final termination in the plaintiff's favor. Some courts have taken the view that nothing less than a determination on the merits will be sufficient termination.⁴ The modern view seems to be that the termination is sufficient when the prosecution has been disposed of in such a manner that it cannot again be revived without institution of new proceedings.⁵ Abandonment of the prosecution by the prosecuting attorney or the complaining witness is generally sufficient termination.⁶ However, release of a prisoner by a deputy sheriff, not authorized to do so, is not abandonment of prosecution enabling the prisoner to maintain malicious prosecution.⁷ Also, abandonment due to technical defects with the intention of bringing new proceedings is not sufficient termination.⁸ Entry of a *nolle prosequi*, not procured by the defendant, is such termination as will support an action of malicious prosecution;⁹ however, there is authority that it is not sufficient.¹⁰ Generally discharge of an accused on writ of habeas corpus to await action of the grand jury is not termination;¹¹ but if the proceeding can go no further, there is sufficient termination to support the action.¹² A failure or refusal of a grand jury to indict followed by discharge is sufficient termination,¹³ although it is not if the proceedings are to be continued.¹⁴ The granting of a pardon has been held not to be adequate termination even where the conviction was procured by perjured testimony.¹⁵ Dismissal of the proceedings by a magistrate on preliminary hearing,¹⁶ or by the trial court¹⁷ is sufficient termination

³Merritt v. Merritt, 193 Iowa 899, 188 N.W. 32 (1922).

⁴Fortman v. Rottier, 8 Ohio St. 548, 72 Am.Dec. 606 (1858).

⁵Brooks v. Super Service, 183 Miss. 833, 183 So. 484 (1938); Graves v. Scott, 104 Va. 372, 51 S.E. 821 (1905); Sullivan v. O'Brien, 85 S.W.2d 1106 (Tex. Civ. App. 1935); Overson v. Lynch, 83 Ariz. 158, 317 P.2d 948 (1957). "Although quashing of an indictment does not preclude initiation of new proceedings for the same offense or other charges, it constitutes a termination of the original proceeding in favor of the accused unless such new proceedings have been initiated before the trial of the civil action."

⁶See v. Gosselin, 133 Conn. 158, 48 A.2d 560 (1946); Shaw v. Moon, 117 Ore. 558, 245 P. 318, 45 A.L.R. 600 (1926); Bratton v. Exchange State Bank, 129 Kan. 82, 281 P. 857 (1929), "The abandonment of a cause of action by the filing of an amended and supplemental petition based on a different cause of action arising out of the same subject matter is such a termination as to support an action for malicious prosecution."

⁷Guidry v. Savoie, 164 La. 1081, 115 So. 277 (1927).

⁸Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775 (1941).

⁹Brooks v. Super Service, 183 Miss. 833, 183 So. 484 (1938); Price v. Cobb, 60 Ga.App. 154, 3 S.E.2d 131 (1939), held that an entry of a *nolle prosequi* is not termination until the six month statutory period has run in which the prosecutor may bring another action.

¹⁰Maclean v. Naurnekeag Trust Co., 286 Mass. 437, 167 N.E. 748 (1929).

¹¹Hinds v. Parker, 11 App. Div. 327, 42 N.Y.S. 955 (1896).

¹²Zebley v. Storey, 117 Pa. 478, 12 Atl. 569 (1888).

¹³Hearn v. Batchelor, 47 Ga.App. 213, 170 S.E. 203 (1933).

¹⁴Knott v. Sargent, 125 Mass. 95 (1878).

¹⁵Turbessi v. Oliver Iron Mining Co., 250 Mich 110, 229 N.W. 454, 69 A.L.R. 1059 (1930).

¹⁶See note 8 *supra*.

¹⁷Graves v. Scott, 104 Va. 372, 51 S.E. 821 (1905).

unless the dismissal was procured by the accused as a favor.¹⁸ Dismissal of the original proceeding is not sufficient where the reason for such dismissal was that the accused had fled from the jurisdiction.¹⁹ A governor's dismissal of extradition proceedings has been held to be adequate termination;²⁰ however, there is authority contra.²¹ Where proceedings are terminated by agreement or settlement of the parties, it is generally agreed that it is not sufficient termination on which to base an action for malicious prosecution.²² However, mere consent to the discontinuance of the criminal prosecution is sufficient;²³ and the compromise or settlement must have been made without coercion or duress.²⁴ Judgment given in favor of the accused on appeal from the lower court is also a final determination giving the defendant a cause of action for malicious prosecution.²⁵ Conversely, dismissal of an appeal from a judgment in favor of a party is a final determination of the case in his favor such as will authorize an action.²⁶ The courts differ on the question of whether an action will lie during the pendency of an appeal from the proceedings complained of—the better rule seems to be that such action will not lie.²⁷ Where only a portion of a judgment in the former action was appealed from, the unappealed portion became final and constituted termination of that separable part of the proceeding for the purposes of an action for malicious prosecution.²⁸ An action for maliciously procuring a search warrant is sufficiently terminated in favor of the accused when the search has been made and the object of the search not found.²⁹ It follows from this discussion of the rule that the defendant in the prior proceedings may not maintain a claim for his damages by way of cross-action, set-off, or counterclaim.³⁰

Historically, the courts have not favored the action of malicious prosecution. It seems they were afraid that, in allowing the action, they would hamper the arrest and prosecution of criminals. On the other hand, the courts, realizing that persons have a right to be protected from vexatious and unwarranted proceedings, evolved the modern rule which adequately protects these interests. This rule seems to balance the interests of society and of the individual. The abandonment of the proceedings, in the principal case, tended to show a lack of probable cause in the institution of such proceedings. This is the reason for the doctrine that the prior prosecution be finally terminated in the plaintiff's favor. To prohibit the plaintiff from bringing an action for his damages would have violated his rights. Although the point has seldom

¹⁸Martin v. Wahl, 17 Tenn.App. 192, 66 S.W.2d 608 (1933).

¹⁹Halberstadt v. New York Life Ins. Co., 194 N.Y. 1, 86 N.E. 801 (1909).

²⁰Keller v. Butler, 246 N.Y. 249, 158 N.E. 510, 55 A.L.R. 349 (1927).

²¹Cowan v. Gamble, 247 S.W.2d 779 (Mo. 1952).

²²Jones v. Donald Co., 137 Miss. 602, 102 So. 540 (1925); White v. International Textbook Co., 156 Iowa 210, 136 N.W. 121 (1912).

²³Lee v. Jones, 44 R.I. 151, 116 Atl. 201 (1922).

²⁴Schwartz v. Schwartz, 206 Wis. 420, 240 N.W. 177 (1932).

²⁵Desmond v. Fawcett, 226 Mass. 100, 115 N.E. 280 (1917).

²⁶Evans v. Atlantic Coast Line R. Co., 105 Va. 72, 53 S.E. 3 (1906).

²⁷Breen v. Shatz, 267 S.W.2d 942 (Ky. 1954); Contra, Marks v. Townsend, 97 N.Y. 590 (1885).

²⁸Albertson v. Raboff, 46 Cal.2d 375, 295 P.2d 405 (1956).

²⁹Scott v. Citizens Hardware and Furniture Co., 183 La. 473, 156 So. 469 (1934); Hollinshed v. Shadrack, 95 Ga.App. 88, 97 S.E.2d 165 (1957).

³⁰Forke v. Homann, 14 Tex.Civ.App. 670, 39 S.W. 210 (1896).

been decided in Mississippi, it appears that the court, in the principal case, has accepted the modern interpretation of the rule, and rightly so.

Jack W. Brand

MISSISSIPPI CONSTITUTIONAL LAW — DELEGATION OF POWER —
SUFFICIENCY OF THE STANDARD*

Appellee admittedly paid its agent, on a fire insurance contract sold by him, a commission of fifteen percent. This was less than the amount prescribed by the Insurance Commission. Appellee contended that that portion of the statute¹ providing a method of fixing the commissions for local insurance agents is unconstitutional. From a decision in favor of defendant-appellee, the State appealed. **HELD:** Affirmed. in favor of Section 5828 dealing with the method of computing commissions for insurance agents is unconstitutional because, *inter alia*, it fails to provide adequate standards for the guidance of the administrative agency to which the authority was delegated. *State v. All-state Insurance Company*, 97 So.2d 372 (Miss. 1957).

While the universal rule is that the legislative power cannot be delegated,² it is equally well settled that the legislature may establish the law and confer discretion in its execution upon another agency.³ In order to render valid even such a limited delegation of authority, the legislature must establish, in its delegating statute, some "standard" by

*Winner of the *Mississippi Law Journal* award for the best case note appearing in the *Mississippi Law Journal* during the 1957-58 scholastic year.

¹Miss. Code Ann. § 5828 (1942), which provides in part: "The Insurance Commission shall . . . address a written communication to every stock fire insurance company authorized to do business in Mississippi and secure its written opinion as to the amount of commissions the . . . company in this state should pay local agents. The Insurance Commission shall then compile this information and shall advise the rating bureau as to the majority opinion, which majority opinion shall fix the amount or rate of the commissions to be paid local agents in this State . . ."

²A.L.A. Schecter v. United States, 295 U.S. 495 (1935); Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

³Curran v. Wallace, 306 U.S. 1 (1939); Park v. Bradley, 204 Ala. 456, 86 So. 28 (1920); People v. Kuder, 93 Cal. App. 42, 269 P. 198 (1928); Hazel v. Gaunt, 126 Colo. 385, 250 P.2d 188 (1952); State v. Stoddard, 126 Conn. 623, 13 A.2d 586 (1940); State v. Retowski, 6 W.W. Harr. 330, 175 A. 325 (1934); State v. Fowler, 94 Fla. 752, 114 So. 435 (1927); Bohammon v. Duncan, 185 Ga. 840, 196 S.E. 897 (1938); Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931); Kryder v. State, 214 Ind. 419, 15 N.E.2d 386, (1938); State v. Manning, 22 Ia. 525, 259 N.W. 213 (1935); Spahn v. Stewart, 268 Ky. 97, 103 S.W.2d 65 (1937); City of Alexandria v. Alexandria Fire Fighters' Ass'n., 220 La. 754, 57 So.2d 673 (1952); Tribbett v. Village of Marcellus, 294 Mich. 607, 293 N.W. 872 (1940); Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 5 (1926); Chicago M. & St. P. Ry. Co. v. Bd. of Ry. Commissioners, 76 Mont. 305, 247 P. 162 (1926); State v. Larson, 10 N.J. Misc. 384, 160 A. 556 (1932); State v. Spears, 57 N.M. 400, 259 P.2d 356 (1953); Gaynor v. Marohn, 268 N.Y. 417, 198 N.E. 13 (1935); Motsinger v. Pearyman, 218 N.C. 15, 9 S.E.2d 511 (1940); Anderson v. Peterson, 78 N.D. 949, 54 N.W.2d 542 (1952); Moxon v. State, 36 Ohio App. 24, 172 N.E. 680 (1930); Ex Parte Woodruff, 90 Okl. Cr. 59, 210 P.2d 19 (1949); Anneberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938); Johnson v. State Highway Commission, 152 S.C. 453, 120 S.E. 269 (1929); Richardson v. Reese, 165 Tenn. 651, 57 S.W.2d 797 (1933); Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070 (1927); State v. Goss, 79 Utah 559, 11 P.2d 340 (1932); Senior Citizens League v. Dept. of Social Security, 38 Wash.2d 142, 228 P.2d 478 (1951); State v. Outagamie County Board, 175 Wisc. 253, 185 N.W. 184 (1921).

which the actions of the administering agency will be controlled.⁴ The question of the validity of such a delegation depends, therefore, upon the sufficiency of the standard prescribed;⁵ and this determination has been made to turn upon the field in which the statute operates,⁶ and the conditions under which the delegation is made.⁷ The theory of the delegation of legislative authority is certainly not novel,⁸ nor is the requirement of a sufficient standard a recent judicial limitation upon that theory.⁹ But while the seed was planted long ago, it is only in recent times that the resulting plant has reached full bloom. The vast changes in our concept of the administration of government wrought during the last thirty years have brought this theory to maturity; and, of course, as the need for and the instances of legislative delegation have multiplied, so the limitations imposed by the requirement of an adequate standard¹⁰ have been proportionately reduced,¹¹ or all but

⁴See note 3 *supra*.

⁵But this is not easily determined. "A standard must be set, but . . . cases teach us how vague a standard may be . . . The Court has indeed set a limit, but it is formal rather than substantive and the slightest care in bill drafting will avoid infringing it". Couzens, "The Delegation of Federal Legislative Power to Executive Officials", 33 Mich. L. Rev. 512, 544 (1934).

⁶The standard required by the courts will not be as stringent in fields where a great deal of discretion is required, as, e.g., public health, *Weber v. Board of Health*, 148 Ohio St. 389, 74 N.E.2d 331 (1947), or in a field such as banking, where regulation has long been established. *Fahey v. Mallonee*, 332 U.S. 245 (1947). See also *Dennis v. Jordan*, 71 Ariz. 430, 229 P.2d 692 (1951). Cf. *State v. Tri-State Telephone & Telegraph Co.*, 204 Minn. 516, 284 N.W. 294 (1939).

⁷In *O'Neal v. United States*, 140 F.2d 908 (6th Cir. 1944), cert. denied, 322 U.S. 729 (1944), the court felt that the exigencies of war should permit the limiting standard to be more flexible than might otherwise be condoned.

⁸*Cargo of the Big Aurora*, 7 Cranch 382 (1813). And see *Cincinnati W. & Z. R.R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 88 (1852), wherein the court said: "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made". Almost the same language was used in *Locke's Appeal*, 72 Pa. St. Rep. 491 (1873).

⁹The requirement of a legislative "standard" was apparently first referred to by that name in *Buttfield v. Stranahan*, 192 U.S. 470 (1904): "This (Act of Congress), was the fixing of a primary standard . . ." But the principle was announced long before. In *Wayman v. Southard*, 10 Wheat. 1 (1825), the Court, speaking through Marshall, C.J., recognized the power of Congress to establish the law, leaving to administrators the power to "fill up the details". And see *Field v. Clark*, 143 U.S. 649 (1892). After the *Buttfield* case, but prior to 1935, the United States Supreme Court referred to the legislative standard in *Red "C" Oil Manufacturing Co. v. Board of Agriculture*, 222 U.S. 380 (1912), and *U.S. v. Shreveport Grain Co.*, 287 U.S. 77 (1932).

¹⁰In only two cases has the United States Supreme Court declared unconstitutional an attempted delegation of authority by Congress. *Panama Refining Co. v. Ryan*, 293 U.S. 389 (1935); *A.L.A. Schecter v. United States*, 295 U.S. 495 (1935). The ineffectiveness of these decisions to deter Congressional delegation is discussed in Nutting, "Congressional Delegations Since the Schecter Case", 14 Miss. L.J. 350 (1942).

¹¹Since the *Panama Refining* and *Schecter* cases, the Court has been disposed to take a somewhat more lenient view in determining the sufficiency of a standard. In *Yakus v. United States*, 321 U.S. 414 (1941), the Court found adequate a standard by which the Administrator under the Emergency Price Control Act was allowed to fix prices which ". . . in his judgment will be generally fair and equitable . . ." And see *Bowles v. Willingham*, 321 U.S. 503 (1944).

obliterated.¹² Courts have come to recognize that in the complex society of today, no legislature is capable of devoting detailed attention to every matter which comes before it,¹³ and, accordingly, have permitted an ever-freer use of the delegatory power.¹⁴ In the field of insurance, there is ample authority for legislative control over commissions paid to brokers,¹⁵ but the reports are almost bare of cases deciding the validity of the delegation of that control. Apparently New York has decided that such delegation may be made.¹⁶ In Mississippi, the general rule prevails, both as to the non-delegability of the legislative power,¹⁷ and as to the delegation of the exercise of discretion in the administration of the law.¹⁸ This latter principle was firmly adopted in *Abbott v. State*,¹⁹ in which the Court upheld a statute²⁰ which conferred broad discretion upon an administrative agency.²¹ Surprisingly, in no case prior to the principal one has the Mississippi Court expressly referred to the necessity of a guiding "standard" imposed by the legislature. But in *Clark v. State*,²² this principle was accepted as the test, at least by implication.²³ Moreover, without previously adopting the "standard" test in express terms, the Mississippi Court has successfully upheld broad delegations of legislative authority²⁴ by summarily dismissing the notion that the delegation was unconstitutional,²⁵ or by treating the question as too obvious to deserve extensive comment.²⁶ And the Court is apparently willing to draw a distinction between matters which are sufficiently important to merit legislative attention and matters which, being less important, may be delegated.²⁷

Without considering the other ground upon which the decision

¹²*Lichter v. United States*, 334 U.S. 742 (1948). The terms "excess profits" as determined by the administrator was held a sufficient standard.

¹³*Taft, C.J.*, in *J.W. Hampton Co. v. United States*, 276 U.S. 394 (1928). And see *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 37 N.W. 782 (1888).

¹⁴Note 10 *supra*. But see *State ex rel. Davis v. Fowler*, 94 Fla. 572, 114 So. 435 (1927), in which the Florida court felt that it was up to the legislature, not the plumbing commission, to establish the state's plumbing code.

¹⁵*O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931).

¹⁶*Northwestern National Insurance Co. v. Pink*, 228 N.Y. 359, 43 N.E.2d 442 (1942).

¹⁷*Alcorn v. Hammer*, 38 Miss. 652 (1859).

¹⁸*Tatum et al. v. Wheelless et al.*, 180 Miss. 800, 178 So. 95 (1938): "The legislature may fix conditions under which an act may operate . . . and confide to some suitable agency . . . the determination of the question of fact upon which the operation is to be suspended The legislature itself must fix the conditions, and cannot delegate that function, but it may delegate the fact-finding function"

¹⁹106 Miss. 340, 63 So. 667 (1913), citing *Field v. Clark*, 143 U.S. 649 (1892).

²⁰Miss. Laws 1908, c. 106.

²¹The act created a board which was invested with the power ". . . to make, promulgate such rules and regulations as in the judgment of the board may be necessary"

²²169 Miss. 369, 152 So. 820 (1934).

²³The Court quoted with approval *Field v. Clark*, *supra* note 19, and, after setting out the provisions of the statute in question, said: ". . . the determination . . . is not left entirely to the arbitrary discretion of the board"

²⁴*Hawkins v. Hoye*, 108 Miss. 282, 66 So. 741 (1914), *Tatum v. Wheelless*, 180 Miss. 800, 178 So. 95 (1938), and *Clark v. State*, 169 Miss. 369, 152 So. 820 (1934).

²⁵In the *Hawkins* case, note 24 *supra*, the Court disposed of the question by saying: "We do not see in this case any violation of . . . the Mississippi Constitution vesting in the legislature only the power to legislate".

²⁶*McLeod v. State ex rel. Colmer*, 154 Miss. 468, 122 So. 737 (1929).

²⁷*Bailey & Bean v. Wilson*, 128 Miss. 49, 90 So. 362 (1922).

in the instant case was based,²⁸ and confining the discussion to the adequacy of the standard imposed, it would seem that the Mississippi Court has taken a rather harsh position in this matter. In the past, the Court has been quite lenient in permitting legislative delegations, following the general, pronounced trend in that direction. But here the Court has imposed upon the legislature the duty of stating, far more explicitly than was heretofore required, a formula under which the administering agency must operate. With due regard to the necessity of maintaining our system of separation of powers, it is submitted that this decision places an unwarranted obstacle in the path of the legislature in availing itself of that expert knowledge for which the Commission was originally created.

Lawrence J. Franck

OIL AND GAS — IMPLIED COVENANT OF FUTURE DEVELOPMENT —
PRUDENT OPERATOR RULE

Lessors brought this action in equity to cancel the undeveloped portion of an oil and gas lease contending that the implied covenant of further development was breached. Eight wells had been drilled prior to 1919 on the north half of the lease and there was only one producing well at the time of the suit. HELD: Affirmed.¹ As the lessee has not drilled any well on the premises in 38 years, and has made no effort to develop the south half of the premises, a court of equity may cancel the undeveloped portions of the lease, notwithstanding the fact that the lessor submitted no proof that a prudent operator would have drilled additional wells; the lessee's evidence that further drilling may prove unprofitable does not constitute a bar to cancellation for breach of implied covenants to develop properly, when the delay is of unconscionable duration. *Wolfson Oil Co. v. Gill*, 309 P.2d 282 (Okla. 1957).

The decision in the noted case was based on the prudent operator rule which has been interpreted as, "whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is . . . required."² The implied covenant of further development is one facet of the prudent operator rule, and formerly, proof of profitability above the cost of drilling, completion, and operation was the determinant of whether a prudent operator would drill additional wells.³ Subsequently, the rule

²⁸That the delegation was invalid because made, not to a state agency, but to the fire insurance companies themselves, 97 So.2d at 376 (Miss. 1957).

¹Decision was 5-3 with C. J. Welch, and J. J. Haley and Johnson dissenting. No dissenting opinion was reported.

²*Brewster v. Lanyon*, 140 F. 801 (8th Cir. 1905), which states further, "No obligation rests on the lessee to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them." Sullivan, Handbook of Oil and Gas Law § 89 n. 23 (1955), in speaking of the implied covenant of development states: "There is no obligation to drill additional wells unless there is a reasonable probability that they will yield a reasonable profit in addition to repaying the cost of drilling and operation."

³*Ramsey Petroleum Co. v. Davis*, 184 Okla. 155, 85 P.2d 427 (1938); *Armstrong v. Skelly Oil Co.*, 55 F. 2d 1066 (5th Cir. 1932).

was modified so that after an unreasonable delay, the burden of proving that further development would be profitable is shifted from the lessor, and the lessee must show special circumstances justifying the non-development.⁴ Further, it has been determined that the lessee should not be permitted to hold a lease for speculative purposes even though it cannot be shown that further development would be profitable to him.⁵ From this hypothesis, it has developed that proof by the lessee of the unprofitability of further drilling does not constitute a bar to cancellation of the lease when there has been a delay of unconscionable duration.⁶ By these modifications, Oklahoma has developed the prudent operator rule to the point that: (1) under usual circumstances, the lessor is burdened with showing that additional wells would be profitable to the lessee; (2) the burden of going forward with the evidence is shifted after an unreasonable delay and the lessee must then show that drilling additional wells would not be profitable; (3) if the delay is so long that the lack of diligence on the part of the lessee is irrebuttably established then the implied covenant of further development is deemed breached and the element of profitability is no longer material.⁷ Therefore, when an unreasonable delay is established, the lessee is confronted with a perplexing problem, for he must go forward with proof that additional wells would be unprofitable or lose part of the lease;⁸ but, if his proof shows that the land is unsuitable for productive purposes as well, the undeveloped portions of the lease have still been cancelled since no injury could result to the lessee.⁹ It is seen then, that a court may effectuate justice by cancelling a portion of a lease when the facts and circumstances warrant.¹⁰

Although Mississippi has not passed on this phase of the prudent operator rule, the rule itself has been recognized;¹¹ however, its application is not yet clear. The Mississippi court could well take note of the modifications made necessary by constant application of the principle to varied factual situations. The instant case is an example of the use of the modified version of the prudent operator rule and appears to be more equitable in its application than its earlier counterpart.

Edward E. Laird, Jr.

⁴Doss Oil Royalty Co. v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1934).

⁵Sand Springs Home v. Clemens, 276 P.2d 262 (Okla. 1954); Morrison v. Johnson, 199 Okla. 264, 185 P.2d 208 (1947); Doss Oil Royalty Co. v. Texas Co., 192 Okla. 259, 137 P.2d 934 (1943). Kuntz, "The Prudent Operator and Further Development", 9 Okla. L. Rev. 255 (1956), states: "If the lessee has no intention of developing the premises, he should withdraw and permit someone with greater optimism to carry on."

⁶McKenna v. Nichols, 193 Okla. 526, 145 P.2d 957 (1944); Colpitt v. Tull, 204 Okla. 289, 228 P.2d 1000 (1951).

⁷Blake v. Texas Co., 123 F. Supp. 73 (E. D. Okla. 1954).

⁸Magnolia Petroleum Co. v. Rockhold, 192 Okla. 628, 138 P.2d 809 (1943).

⁹Sand Springs Home v. Clemens, 276 P.2d 262 (Okla. 1954). (This is the dilemma that faced the lessee in the noted case.)

¹⁰Shell Oil Co. v. Howell, 208 Okla. 598, 258 P.2d 661 (1953); Shell Oil Co. v. Lee, 258 P.2d 666 (Okla. 1953); Trawick v. Castleberry, 275 P.2d 292 (Okla. 1953).

¹¹Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So.2d 176 (1954), holds that the prudent operator rule is not applicable in a suit for drainage of the lessor's land when the lessee owns the adjacent land where the drainage is being done, for the

TITLE BY ESTOPPEL — QUIT CLAIM DEEDS — EXCEPTION TO STATUTORY
IN MISSISSIPPI

In 1944 Pettis paid one dollar as consideration for a quitclaim deed by Herrington who conveyed "all my right, title, and interest in and to all minerals and the right to develop the same in the land." At the time of the conveyance, Herrington had no title or interest in the land. In 1952 the land was subsequently conveyed to Herrington without any mineral reservation. Herrington and his wife, then conveyed the land to McLaurin, the other defendant, reserving a 1-16 interest in the oil, gas and minerals. McLaurin leased the remaining mineral rights to Cities Service Company for a term of ten years. The original bill sought to cancel as a cloud on the title of Pettis, the deed executed by Herrington and his wife to McLaurin and, also, McLaurin's lease to Cities Service Company. Defendants filed a general demurrer assigning as grounds that no equity appeared on the face of the bill. The demurrer was overruled and the chancery court granted to the defendants an interlocutory appeal to the Supreme Court to settle the controlling principles of law. **HELD:** Reversed. The demurrer should have been sustained. The instrument clearly manifests an *intention* on the part of the grantor to convey whatever interest was vested in the grantor at the time of the execution of the instrument. Since Herrington had no interest, the instrument conveyed none. There is nothing in the quitclaim deed to indicate any intention on the part of Herrington to convey any interest that he might subsequently acquire. The doctrine of estoppel is inapplicable since the estoppel is coextensive only with the estate, right or title conveyed. *McLaurin v. Royalties, Inc.* 95 So.2d 105 (Miss. 1957).

The doctrine of estoppel by deed has existed from the earliest collections of English Law.¹ In Coke's day the estoppels were called "odious"² by the courts, but today they have existed long enough to have lost most of this stigma.³ The earlier idea for support of estoppel was that estoppel will lie where there would otherwise be circuity of action.⁴ The modern conception is that the doctrine of estoppel may be supported by mere representation.⁵ The general rule governing this seg-

lessee is *prima facie* liable for royalty on all oil taken from lessor's land. Three dissenters felt that the prudent operator rule should be followed and the lessor be required to show that off-set wells would be profitable. (It is noted that there was no question of unreasonable delay in this case.)

¹Record of estoppel by deed is found in the earliest yearbooks. Bigelow, *Estoppel* at 5 (6th ed. 1913).

²*Ibid.* Estoppel was not favored in Coke's day because it was used to shut out the truth against reason and sound policy.

³In *Comstock v. Smith*, 13 Pick. 116 (Mass. 1832) the court commented, "But the doctrine of estoppel aids much in the administration of justice; it becomes odious only when misunderstood and misapplied."

⁴In *Carter v. Bustamente*, 59 Miss. 559 (1882) the court said, "The rule that a subsequently acquired title passes by virtue of a prior deed was originally applied to avoid circuity of actions; for, if the vendor is permitted to recover the property under a title paramount subsequently acquired by him, he in turn would be bound to respond on his warranty." 58 A.L.R. 359 (1929).

⁵*Davis v. Bowmar*, 55 Miss. 671 (1898); *Crooker v. Hollingsworth*, 210 Miss. 636, 46 So.2d 541 (1950); *Breen v. Morehead*, 126 S.W. 650 (Tex. Civ. App. 1911); 14 Tenn. Law Rev. 119; 4 *Tiffany, Real Property* § 1230 (3rd ed. 1939).

ment of the doctrine of estoppel⁶ is that one who subsequently acquires a title or estate which he previously conveyed is estopped to assert his after-acquired title against the grantee or his successors. The after-acquired title of the grantor is said to inure to the grantee immediately.⁷ At common law it was necessary that there be covenants of warranty in the deed, but now the courts may look to the intention of the parties.⁸ For instance, where the grantor uses the words "right, title and interest" showing that he intended to transfer no greater title than that which he possessed, an after-acquired title will not pass by estoppel.⁹ In absence of a statute, it is the general rule that a quitclaim deed will not ordinarily estop¹⁰ a grantor from asserting an after-acquired title or interest. However, Mississippi has a statute¹¹ which states that a quitclaim deed is sufficient to pass all the grantor's interest in the estate or land to be conveyed and to estop him from asserting an after-acquired title.

The instant decision reflects a problem experienced by all judicial bodies at one time or other. Sometimes in order to render justice "bad law" results.¹² Still this decision has not arrived without some forewarning.¹³ It is submitted that while those who have relied on section

⁶The other two divisions under the doctrine of estoppel are estoppel by record and estoppel in pais.

⁷Kaiser v. Earhart, 64 Miss. 492, 1 So. 635 (1887); Edwards v. Hillier, 70 Miss. 803, 13 So. 692 (1893); Meyers v. American Oil Co., 192 Miss. 180, 5 So.2d 218 (1941); Martin v. Raleigh State Bank, 146 Miss. 1, 111 So. 448 (1927).

⁸Wade v. Barlow, 99 Miss. 33, 54 So. 662 (1911); Miss. Saw Mill Co. v. Douglas, 107 Miss. 678, 65 So. 885 (1914); 1 Patton, Titles § 216 (2d ed. 1957). Strict necessity of warranty has been relaxed. 27 Tenn. L. Rev. 856; 44 W. Va. Qu. 71; 58 A.L.R. 358 (1929).

⁹Crow v. Hardwood Co. v. Burks, 149 Miss. 327, 115 So. 585 (1928); but see Whitten v. Daws, 226 Miss. 96, 83 So. 2d 744 (1955); 1 Patton, op. cit. supra note 8, § 216.

¹⁰Mitchell v. Woodson, 37 Miss. 367 (1859); Ethridge, "The After-Acquired Property Doctrine", 17 Miss. L. J. 155 (1945); 2 Devlin, The Law of Real Property and Deeds § 944 (3rd ed. 1911). But see Van Renesselaer v. Kearney, 11 How. 297, 13 L. Ed. 703 (1850); Bradley Estate Co. v. Bradley, 97 Minn. 161, 106 N.W. 110 (1906), where it was held that an expression in the quitclaim deed to convey an interest subsequently acquired will pass the interest in absence of statute.

¹¹"A conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed." Miss. Code Ann. § 846 (1942).

¹²"A statute should be construed according to the ordinary and natural import of its language, unless a different meaning is clearly indicated by the context, without resorting to subtle or forced interpretation for the purpose of extending or limiting its operation. Where there is ambiguity in the provisions of a statute, or the intention of the legislature is doubtful, the Court may look to the consequences; but where the language of the statute is clear and explicit, and express a definite and sensible meaning, the Court cannot disregard the mandate of the Legislature and insert an *exception*, where none has been made by the Legislature, for sake of relieving against *hardship* or *injustice*." Schmeizl v. Schmeizl, 186 Md. 371, 46 A.2d 619 (1946). See also Koch v. Bridges, 45 Miss. 247 (1871); State Tax Commission v. Potomac Electric Power Co., 182 Md. 111, 32 A.2d 382 (1943); Maryland Unemployment Compensation Board v. Albrecht, 183 Md. 87, 36 A.2d 666 (1944); Black, Interpretation of Laws § 24-27 (2d ed. 1911).

¹³In Crooker v. Hollingsworth, 210 Miss. 636, 46 So.2d 541 (1950), it was stated that an "unusual case will authorize a circumvention of Section 846." In Ethridge, supra note 10 at 156 two "probable exceptions to the rule" were propounded: 1. Where the quitclaim deed purports to convey "all my right, title, and interest which I *presently* have in and too" (i.e. an instrument purporting to convey only a present interest), it will not estop the grantor from asserting a subse-

846 squarely, may be keenly aware of the possible disastrous effect of this decision on existing quitclaim deeds similar to the one relied on here, still the results in quitclaiming land in the future will be closer to the real intention of the parties. Henceforth, the grantee should obtain more than the grantor's "right, title or interest" by adding in the quitclaim deed the following: "which I now own or should subsequently acquire." The grantor who knowingly conveys this amount of interest *should* be estopped to assert any after-acquired title. It should be noted that in effect this instant decision asks for the same manifestation of intention by the grantor in the statutory quitclaim deed as courts in other states require in common law quitclaim deeds. In short the statute has been reduced to common law level of some jurisdiction.¹⁴

Thomas D. Berry, Jr.

TORTS — ATTRACTIVE NUISANCE DOCTRINE — LIABILITY FOR DROWNING OF TRESPASSING CHILD

Action was brought by the father individually and as administrator of his son's estate for the death of his nine year old son by drowning in a pond on defendant's land. Prior to defendant's purchase of the land, the former owner had excavated a pit which filled with water. To beautify the area for real estate development the banks of white sand were graded, leaving a sudden drop off three feet from the shore. The defendant had knowledge that a floating dock and raft had been placed in the water and that the area was being used by trespassers as a swimming place. More than a year after defendant's purchase and several months after the defendant had learned of the conditions existing, the deceased child, who had never visited the area before, went to play there. The child, last seen alive by two boys who saw him playing on the raft, was found drowned in the deep water near the raft. The plaintiff sought to recover under the attractive nuisance doctrine, and judgment was rendered for him. HELD: Affirmed. The general rule is that the owner of an artificial body of water is not guilty of actionable negligence on account of drownings therein unless it is constructed so as to constitute a trap or unless there is some unusual element of danger lurking about it not existent in ponds generally. The circumstances set forth above bring the case within the exception to the general rule as to an owner's liability for drownings in an artificial body of water and place them under the attractive nuisance doctrine. *Ansin v. Thurston*, 98 So.2d 87 (Fla. 1957).

At common law there was no duty upon the landowner with respect to a trespasser,¹ except to refrain from wilfully or wantonly injuring him.² One of the exceptions to this general rule is where the

quent acquisition of the property. 2. Where the grantee had full knowledge that the grantor did not have title or an interest in the land, no estoppel will lie.

14. *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703 (1850); *Bradley Estate Co. v. Bradley*, 97 Minn. 161, 10 N.W. 110 (1906).

¹James, "Tort Liability of Occupiers of Land: Duties Owed to Trespassers," 63, Yale L. R. 144 (1953).

²*Trice Coffee Co. v. Clemens*, 168 Miss. 748, 151 So. 175 (1933).

trespasser is an infant, which came to be known as the attractive nuisance doctrine.³ After originating in England in 1841⁴ the doctrine was first initiated in this country in 1873 by the United States Supreme Court.⁵ The doctrine is based upon the legal fiction that the infants are "impliedly invited" because of the attraction created by the landowner.⁶ Today the doctrine is widespread throughout this country, being rejected in only eight states,⁷ and in other states the principle is applied under a different name.⁸ In a case where a child drowns in a water hazard, there are eleven states which consistently refuse the application of the doctrine,⁹ but even in these jurisdictions there are implications that a different rule would be followed if the drowning had resulted from some hidden inherent danger.¹⁰ In the federal courts and thirteen states the attractive nuisance doctrine has also been held inapplicable to the ordinary water hazard,¹¹ although the presence of

³Restatement, Torts § 339 (1934): "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial conditions which he maintains upon the land, if

- (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
- (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such condition, and
- (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
- (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein".

⁴Lynch v. Nurdin, 1 Q.B. 29 (1841).

⁵Sioux City & Pac. R. v. Stout, 17 Wall. 657 (U.S. 1873).

⁶Green, "Landowners' Responsibility to Children", 27 Texas L. Rev. 1 (1948). "The situation created by the landowner was attractive to children. It was therefore a temptation or a lure. A temptation to children was an implied invitation to them to come on the premises. Having raised them to the level of invitees, the landowning tempter was morally and legally under a duty to care for the little sinners he had tempted onto his premises."

⁷Lewis v. Mains, 150 Me. 75, 104 A.2d 432 (1954); State v. Baltimore Fidelity Whse. Co., 176 Md. 341, 4 A.2d 739 (1939); Urban v. Central Mass. Elec. Co., 301 Mass. 519, 17 N.E.2d 718 (1938); Frost v. Eastern R. Co., 64 N.H. 220, 9 A. 790 (1886); Morse v. Buffalo Tank Corp., 280 N.Y. 110, 19 N.E.2d 981 (1939); Hannan v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921); Previte v. Wanskuck Co., 80 R.I. 1, 90 A.2d 769 (1952); Trudo v. Lazarus, 116 Vt. 221, 73 A.2d 306 (1950).

⁸Wolfe v. Rehbein, 123 Conn. 110, 193 A. 608 (1937); Parsons v. Appalachian Elec. Power Co., 115 W.Va. 450, 176 S.E. 862 (1934); Daugherty v. Hippchen, 175 Va. 62, 7 S.E.2d 119 (1940).

⁹Alabama, Luallen v. Woodstock Iron & Steel Corp., 236 Ala. 621, 184 So. 182 (1938); Arizona, Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909); Colorado, Phipps v. Mitze, 116 Colo. 288, 180 P.2d 233 (1947); Georgia, Crawford v. Follard, 55 Ga. App. 702, 191 S.E. 162 (1937); Iowa, Hecht v. Des Moines Playground & Recreation Assn., 227 Iowa 81, 287 N.W. 259 (1939); Kentucky, Von Almen v. Louisville, 180 Ky. 441, 202 S.W. 880 (1918); Mississippi, Thompson v. Illinois Central R. Co., 105 Miss. 636, 63 So. 185 (1913); Oklahoma, Dennis v. Spillers, 199 Okla. 311, 185 P.2d 465 (1947); Oregon, Riggle v. Lens, 71 Ore. 125, 142 P. 346 (1914); South Dakota, McCleod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946); Wisconsin, Larson v. Equity Co-Op Elevator Co., 248 Wis. 132, 21 N.W.2d 253 (1946).

¹⁰Thompson v. Illinois Central R. Co., supra note 9 and Dennis v. Spillers, supra note 9.

¹¹United States, Trogia v. Butte Superior Mining Co., 270 F. 75 (9th Cir. 1921); California, Demmer v. Eureka, 78 Cal. App.2d 708, 178 P.2d 472 (1947); District of Columbia, Sullivan v. Huidekoper, 27 App. D.C. 154, 7 Ann. Cas. 196 (1906); Idaho, Bicandi v. Boise Payette Lumber Co., 55 Idaho 543, 44 P.2d 1103 (1935); Illinois,

some unusual danger has given rise to its application in other instances in the same jurisdictions. There are several states which are indefinite as to their view, although there is some indication that the doctrine would not be applied to a water hazard merely because of its attractiveness.¹² There are many reasons given by the courts for not applying the doctrine in the case of infants drowning in water hazards. Besides the difficulty in placing any practical limitation upon liability,¹³ one reason is that the danger inherent in water when contained in a pond is or should be obvious to a child, and such pool does not, therefore, constitute "an unreasonable risk of death or serious bodily harm" to the trespassing children.¹⁴ Another reason for refusal of the doctrine is that there was nothing unusual about the water hazard in which the child was drowned.¹⁵ The doctrine has also been refused when the specific danger involved was known to the child or where the child had been warned about it,¹⁶ where the vast impracticability of guarding the water hazard has been recognized,¹⁷ where the water hazard was not artificial,¹⁸ where it was very improbable or unlikely that a fatal accident might occur from the hazard,¹⁹ where the defendant had no control over the premises where the drowning occurred,²⁰ where the invitation was not to be implied from the attraction itself,²¹ where the danger involved was obvious,²² where there is no hidden peril,²³ and where there is no allegation or evidence that the child was attracted by the water hazard or the condition which led to the drowning.²⁴

The attractive nuisance doctrine was introduced in Mississippi in 1887, when an infant fell over the precipitous side of a hill near his home.²⁵ The doctrine has been applied in this state to cases of lumber

Peers v. Pierre, 336 Ill. App. 134, 83 N.E.2d 20 (1948); *Indiana, Evansville v. Blue*, 212 Ind. 130, 8 N.E.2d 224 (1937); *Kansas, Sroufe v. Garden City*, 148 Kan. 874, 84 P.2d 845 (1938); *Louisiana, Peters v. Ruston*, 167 So. 491 (La. App. 1936); *Minnesota, Stadtherr v. Sauk Center*, 180 Minn. 296, 231 N.W. 210 (1930); *Nebraska, Spence v. Polenski Bros.*, 110 Neb. 56, 193 N.W. 101 (1923); *North Carolina, Nichols v. Atlantic Coast Line R. Co.*, 228 N. C. 222, 44 S.E.2d 879 (1947); *Tennessee, McCay v. Dupont Rayon Co.*, 20 Tenn. App. 157, 96 S.W.2d 177 (1935); *Utah, Charvoz v. Salt Lake City*, 42 Utah 455, 131 P. 901 (1913); *Washington, Smith v. McGoldrick*, 124 Wash. 363, 214 P. 819 (1923).

¹²Missouri is a very good example. *Williams v. Kansas City, C.C. & St. J. R. Co.*, 222 Mo. App. 865, 6 S.W. 2d 48 (1928).

¹³*Morris v. Britton*, 66 S.D. 21, 279 N.W. 531 (1938).

¹⁴*Ibid.*

¹⁵*McKenna v. Shreveport*, 16 La. App. 234, 133 So. 524 (1931).

¹⁶*Vincent v. Barnhill*, 203 Miss. 740, 34 So.2d 363 (1948); *Phipps v. Mitze*, 116 Colo. 288, 180 P.2d 233 (1947).

¹⁷*Thompson v. Illinois C. R.*, 105 Miss. 636, 63 So. 185 (1913); *Cobb v. Lowe Mfg. Co.*, 227 Ala. 456, 150 So. 687 (1933).

¹⁸*Vincent v. Barnhill*, *supra* note 16; *Nichols v. Atlantic Coast Line*, 228 N.C. 222, 44 S.E. 2d 879 (1947).

¹⁹*Vincent v. Barnhill*, *supra* note 16; *Thompson v. Illinois C. R. Co.*, *supra* note 17.

²⁰*Thompson v. Illinois C. R. Co.*, *supra* note 17, *Tavis v. Kansas City*, 89 Kan. 547, 132 P. 185 (1913).

²¹*Wood v. Consumers Co.*, 334 Ill. App. 530, 79 N.E.2d 826 (1948).

²²*McCall v. McCallie*, 48 Ga. App. 99, 171 S.E. 843 (1933).

²³*Dennis v. Spillers*, 199 Okla. 311, 185 P.2d 465 (1947).

²⁴*McComb City v. Hayman*, 124 Miss. 525, 87 So. 11 (1921); and *Memphis v. Trice*, 13 Tenn. App. 607 (1931).

²⁵*Mackey v. City of Vicksburg*, 64 Miss. 777, 2 So. 178 (1887). The municipal corporation was held liable even though the child was a trespasser in going upon the premises.

being piled in the street,²⁶ an uninsulated wire running through the branches of a tree,²⁷ a railroad turntable,²⁸ an electric transformer station,²⁹ a bluff graded by the city,³⁰ and a fallen street light.³¹ But our court has refused to apply the doctrine where the danger was manifest, and where the child was fully capable of and did appreciate the danger,³² or where the instrumentality was sufficiently concealed, so as not to be attractive.³³ There have been three cases of infants drowning in Mississippi,³⁴ but the attractive nuisance doctrine was not applied in any of the cases. The earliest of these cases³⁵ refused application on the ground that the injury was not to be reasonably anticipated as probable, and thus could not have been prevented by reasonable precautions. A later case³⁶ did not use the doctrine because the water hazard was not artificially created. The latest case of an infant drowning³⁷ was in 1948, when the court refused the doctrine because there were no extraordinary circumstances which would make the pond attractive.

In view of the last three cited Mississippi cases it is submitted that the trend of the Mississippi Supreme Court is to follow the same rule demonstrated in the principal case. This belief is based upon the facts that the lake was artificially created and possessed extraordinary features which would make the pond attractive to children.

Pat H. Scanlon

²⁶Spengler v. Williams, 67 Miss. 1, 6 So. 613 (1889).

²⁷Temple v. McComb City Electric Light & Power Co., 89 Miss. 1, 42 So. 874 (1906). The Court held that an electric company was bound to take notice of the habits of children to climb trees.

²⁸Dampf v. Yazoo & Miss. Valley R. Co., 95 Miss. 85, 48 So. 612 (1909).

²⁹Henry v. Miss. Power & Light Co., 166 Miss. 827 146 So. 857 (1933).

³⁰Mayor of Vicksburg v. McLain, 67 Miss. 4, 6 So. 613 (1889).

³¹Patera v. City of Brookhaven, 95 Miss. 774, 49 So. 617 (1909).

³²Salter v. Deweese-Gammil Lumber Co., 137 Miss. 229, 102 So. 268 (1924).

³³Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928).

³⁴Thompson v. Illinois C. R. Co., 105 Miss. 636, 63 So. 185 (1913); McComb City v. Hayman, 121 Miss. 525, 87 So. 11 (1920); Vincent v. Barnhill, 203 Miss. 740, 34 So.2d 363 (1948).

³⁵Thompson v. Illinois C. R. Co., *supra* note 34.

³⁶McComb City v. Hayman, *supra* note 34. "In order for a thing dangerous to children to come within the attractive nuisance doctrine, it must have been artificially created."

³⁷Vincent v. Barnhill, *supra* note 34. "We think that view is proper, unless extraordinary circumstances, such as are not here present, make by its own peculiar facts, an exception to the generally accepted rule that pools and ponds are not ordinarily to be treated as attractive nuisances."

RECENT BOOKS

LEGAL MEDICINE. By R. B. H. Gradwohl.
St. Louis: The C. V. Mosby Co., 1954. Pp. 1093.

Here is a book which presents a most comprehensive and exhaustive coverage of the field of forensic medicine. Within its pages is the combined knowledge and experience of an outstanding array of no less than twenty-nine of the world's most renowned authorities, including doctors, lawyers and law-enforcement experts, who collaborated with editor-author Gradwohl in presenting this detailed and timely study.

The book abounds with medical and clinical tests and data—yet it contains a great deal of elementary and basic information so that the average practitioner will be able to understand and use the material in both criminal and civil matters. It is profusely illustrated with photographs, drawings and charts and at the end of each chapter appears a complete list of references to other volumes of the same subject matter for those who wish to make further research.

The thirty-nine chapters run the gamut of all types of injuries, wounds, and causes of death. A partial list of subjects covered includes history of legal medicine, autopsy, asphyxia, poisoning, trauma, rape, skeletal and dental evidence, paternity proceedings, intoxication, abortion, forensic psychiatry, mental illness, lie detection, medical expert witnesses, laboratory administration, and official investigation.

Statutes and common law of the different jurisdictions are set forth in connection with the various subjects and give the reader an excellent reference to overall law. In this book the investigator is told what evidence to get and how to get it, and the analyst is shown how to test the evidence and reach conclusions therefrom; thereby the lawyer gains an insight on the evaluation of that evidence and the use of it in both prosecution and defense.

Of course, the last word is not expected from any one volume on forensic medicine, but Dr. Gradwohl has done an admirable job of gathering, consolidating and editing this mass of information which should prove invaluable to all connected with the law.

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THE JOINT VENTURE AND TAX CLASSIFICATION.

By Joseph Staubman. New York: Federal Legal Publications, Inc., 1957. Pp. 493.

The title, *The Joint Venture and Tax Classification*, would indicate a more restricted scope than that actually covered by this well-written text.

The author has exhaustively traced the history of the joint venture from the Babylonian partnership to the forms presently used in business. In defining "joint venture" he has found it necessary to distinguish and compare this business form with partnerships, syndicates, associations taxable as corporations, corporations, and others. In so doing, he has shed new light upon the better-known forms of partnership, corporation, estate and trust.

This text is both scholarly and pragmatic. It is scholarly in its careful tracing of the growth of the joint venture, although these particular sections make difficult reading because of the numerous unfamiliar foreign terms descriptive of various analogous forms of association. It is pragmatic in its excellent treatment of the joint venture as employed in the fields of oil and gas, motion pictures, theater, and real estate. As an underlying theme, the author warns against the tendency toward legal over-specialization and cautions that legal analysis of business forms should be made in the light of teachings from philosophy, history, economics, and other related fields.

In discussing the tax classification of the "joint venture," the author traces the tax treatment of associations of which the joint venture is one form from the Revenue Act of 1894 through and beyond the Revenue Act of 1954. This historical tracing becomes even more valuable when viewed against the backdrop of the author's accompanying comments on the particular statutes and cases involved.

In view of the serious and oft-time disastrous results arising from the unexpected tax classification of a venture as a partnership or corporation, it behooves all attorneys forming business associations to be well-acquainted with the distinctions between the various business forms for tax purposes. I know of no other single text which discusses these distinctions with the clarity of *The Joint Venture and Tax Classification*.

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DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES. By Albert P. Blaustein and Clarence Clyde Ferguson, Jr. Newark: Rutgers University Press. Pp. 333. \$5.00

The book being reviewed was written by professors at the Rutgers University Law School, and as the sub-title indicates, it is a study of "the meaning and effect of the school segregation cases." The authors first consider the function of the Supreme Court in interpreting the Constitution, the background of the Fourteenth Amendment, and the course of decision under that Amendment relating to racial matters. With this perspective, *Brown v. Board of Education*¹ is then subjected to a detailed analysis. Then there is a summary of the trend of decision subsequent to *Brown*, followed by a survey of the patterns of compliance, evasion, avoidance and delay which have become part of the order of things in the South. Too much of what has been written and said about the segregation cases has been either uncritical and unqualified acclaim or violent and vitriolic denunciation. This book is therefore both welcome and valuable as a dispassionate and unemotional study of the Supreme Court decisions.

The nature and quality of much of the discussion of the segregation cases indicates that there is a widespread misunderstanding as to the nature of the Constitution and the function of the Supreme Court in our constitutional system. Judicial review has been a basic part of our system throughout our history. Under this power the Supreme Court is the final interpreter of the Constitution and can invalidate national and state laws which it finds to be in conflict with the Constitution. The Constitution, however, is not merely a legal but also a political document, many important parts of which are written in general language which has no inevitable or inflexible meaning or application. Furthermore, the society of which this Constitution is the "supreme law" is dynamic and not static, complex and not simple. Under these circumstances, social, economic and political conflicts historically have gravitated to the Supreme Court as constitutional questions. All of which means, in the exercise of judicial review in constitutional cases, that the Court acts as a policy-making body, that its function is essentially legislative, and that in a sense it does amend the Constitution. Informed students of the Constitution and the Court, however, realize that this has always been the case, and indeed cannot be otherwise, so long as the power shall exist. Under the operation of judicial review, the Constitution has never been a static document, it has been a continually evolving instrument of government.

But even recognizing all this, there is no doubt that the authors are correct when they state in their preface that "*Brown v. Board of Education* was admittedly a radical decision." (p.xi). Certainly the decision constitutes a dramatic interplay of many of the major issues of American constitutional law, e.g., the relation between judicial and legislative power, the relation between national and state power, the proper scope of judicial review and the role of the Supreme Court in the shaping of American society, the determination of specific mean-

ing and application of general language, and the importance of stare decisis in constitutional adjudication. In the course of their analysis the authors discuss most of these problems.

As to the power of the Supreme Court vis-a-vis Congress, critics of the segregation decision have alleged that the clear inference to be drawn from Section 5 of the Fourteenth Amendment—"The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article"—is that only Congress, and not the Supreme Court, has the power to implement the Amendment. This assertion is equivalent to denying the existence of judicial review, which by definition is the power of the Court to determine whether a legislative enactment—Congressional or state—is permitted or prohibited by the language of the Constitution. It is the same power which all state supreme courts possess and exercise over state laws under state constitutions. The Court's power to invalidate statutes as forbidden by the Fourteenth Amendment is no different from its power to invalidate national or state laws under any other part of the Constitution. Since Congressional enactments under Section 5 have been few, a vast majority of the cases arising under the Fourteenth Amendment have been those in which the Court has been asked to judicially enforce the prohibitions. It is beside the point to argue whether, as an original proposition, the power of judicial review was an intended part of our system. Almost all students of the field recognize it as a necessary part, if not expressly required by the text of the Constitution, at least legitimized by a hundred and fifty years of history. Clearly the purpose of Section 5 was to extend the power of Congress beyond what it had previously been. But the authors correctly point out that "There is nothing in the events surrounding ratification which indicates that Congress or the state legislatures intended to prohibit Supreme Court implementation of the generic rights in the Amendment (p. 72) . . . Nothing was said or done by the framers to preclude necessary Supreme Court adaptation of the Fourteenth Amendment in the normal course of constitutional litigation." (p.73). Still, when all this has been said, it remains true that there is no comparable instance in which the Court has assumed the willingness to make such a far-reaching implementation of such momentous consequences in a context where Congress had withheld a legislative remedy.²

As to the relation between national and state power, the real problem of federalism involved in the segregation cases has been obscured by the clamor about "states rights." On its face the Tenth Amendment recognizes that certain powers are prohibited by the Constitution to

²The argument has even been made that the Fourteenth Amendment itself is invalid, since ratification by unreconstructed Southern states was obtained by coercion. Whether or not the coercion tainted the ratification process with illegality is arguable, since the analogy to contract law is a dubious one. But in any event, the argument is beside the point for two reasons. First, all agencies of both national and state governments have recognized and accepted the Amendment's vitality since its promulgation, thus giving prescriptive validity if such were necessary. Second, the Court has declared that questions relating to the amending process are among those denominated "political," i.e., those as to which the determination of elected officials is final. The issue of the Amendment's validity is therefore not even a justiciable one, and such assertion is an exercise in futility. See *Coleman v. Miller*, 307 U.S. 433 (1939).

the states, and therefore are not reserved by the states. One of these prohibitions is that no state may deny equal protection of the laws. Of course the Fourteenth Amendment—nor, for that matter, the Tenth Amendment—does not refer specifically to schools. It speaks in general language, but it should be obvious that a state does not have any reserved power to deny equal protection of the laws—whatever that might mean—in its operation of a school system any more than in its criminal statutes, or its laws regulating banks or railroads or what have you, none of which are mentioned in the Fourteenth Amendment. Speaking more broadly, it is a fallacy to equate the American federal system of government with the doctrine of “states rights.” Actually, as a matter of original intent and also constitutional history, the “states rights” doctrine is a deviation from American federalism. The bed-rock of the Constitution is not the Tenth Amendment, it is the supremacy clause of Article VI. The power to determine constitutional meaning and applicability and to resolve contests of power between nation and state lies with the instrumentalities of the national government, and not with the states. It was so intended, and so it has always been. The real problems of federalism deal with the wisdom with which decisions are made in particular instances, and this is the true basis on which the segregation decisions are subject to legitimate criticism. The sheer picture of federal judges sitting over a vast area as one-man school boards is one which ought to give serious pause even to those who disagree with segregation. More than any other institution, public schools have traditionally been thought by Americans to be of state and local concern. Not to speak of the administrative difficulties thrown upon the federal courts by this new supervisory authority, it is impossible to calculate the effect which implementation of this decision over the years will have upon the interest or participation which Americans will take in their local governments generally.

Much criticism has been directed against the segregation decisions on the ground that they were a departure from stare decisis. The authors correctly point out that, valuable as adherence to precedent is as a general rule in giving stability and predictability to law, stare decisis has never been an absolute rule. The law has never been static, any more than has the society out of which it springs. The law of life, and the life of the law, has not been rigidity, it has been change. One may disagree vehemently with the wisdom of a particular departure from stare decisis, but in final analysis, it is a matter for judicial decision and there is no question of power involved.

One of the most widely disseminated misconceptions concerning the segregation cases is that there were no legal principles which supported them, and that they rested solely on sociological findings. The authors deny this, stating that the decision “was rooted in sound legal doctrine and based in large measure upon judicial pronouncements which long preceded the judgment in *Plessy v. Ferguson*.”³ (p.138). The first part of this statement is correct, as a study of the cases will demonstrate. In the earliest decisions under the Fourteenth Amendment⁴ the

³163 U.S. 537 (1896).

⁴The Slaughterhouse Cases, 16 Wallace 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880).

Court found the primary purpose of the Amendment to be a general prohibition against racial discrimination, and declared that the Amendment should be interpreted liberally to realize this purpose. In various specific contexts—jury service, property rights, suffrage qualifications—the Court subsequently held that racial classifications were prohibited.⁵ The only exception in the application of this legal principle was the “separate but equal” doctrine which was approved, in *Plessy* and its progeny, in the fields of transportation and education.⁶ The most recent decisions prior to *Brown* had clearly indicated that in the field of higher education separate facilities could not be equal.⁷ Had the Court so chosen, therefore, it could have decided the *Brown* case simply by overruling the “separate but equal” doctrine and extending the principle of non-discrimination to the context of public education, thus bringing it within the general rule.

But the Court did not decide the case this way. Equal protection cases typically speak of the “reasonableness” of a racial classification, but there is not a word in *Brown* which deals with the “reasonableness” of a racial classification in the field of education. Only in the companion case, *Bolling v. Sharpe*,⁸ based on Fifth Amendment due process, does the concept receive passing mention. The conclusion of the authors, drawn not only from *Brown* but from the use of *Brown* as a precedent in later cases dealing with transportation and recreation facilities,⁹ is that the Court decided that *all* classifications by race is unconstitutional, thus making the question of “reasonableness” in any specific context irrelevant. This is undeniably the effect of the decision, but is not the ground upon which the Court chose to explicate its result. Although the Court could have based its result solely on legal principles and judicial precedent, the fact remains that, save for one sentence and one footnote, it did not do so.

Upon what, then, was the decision based? The authors state that the extent to which psychological and sociological evidence led to the result “is the realm of speculation. And while a court can and should make use of nonlegal materials, it cannot be said with certainty that the Supreme Court actually used such data in reaching its 1954 conclusion in *Brown v. Board of Education*.” (p.138) I cannot agree that it is speculative and uncertain, if one accepts the Court’s opinion at face value. The central argument advanced by the Court runs as follows: racial segregation required by law generates a feeling of inferiority in the Negro child; this feeling of inferiority affects the motivation of the child to learn; this decreased motivation retards the educational and mental development of the child; therefore the opportunity afforded to Negro children is less than that accorded white children. At this point

⁵E.g., in addition to cases cited in note 4, *Buchanan v. Warley*, 245 U.S. 60 (1917); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944).

⁶Those who decry “judicial legislation based on sociology” might remember that this description also fits *Plessy v. Ferguson*.

⁷*Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

⁸347 U.S. 497 (1954).

⁹E.g., *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956).

the Court made its famous statement that "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." The Court here cited its equally famous footnote 11, referring to the writings of men in the fields of psychology, education, sociology, and economics. On the basis of this factual finding, the legal conclusion was then drawn that the state had denied equal protection of the laws. It seems clear, even unanswerable, therefore, from the Court's own words, that the case was considered and decided, not in terms of the reasonableness of the classification, or even in terms of a per se prohibition against racial classification, but in terms of the inequality which results from segregation. And the existence of the inequality was found as a fact, the Court tells us, on the basis of psychological and sociological evidence. It does not seem, therefore, to be a matter of speculation and uncertainty at all.

What may fairly be said of grounding the decision on such an argument and on such evidence? One does not have to believe in either the principle or practice of segregation to consider the argument specious to its face. Educationally, one might think that the purpose of a school is to communicate facts and ideas and to encourage individual thought processes. If race is really an irrelevant factor, then there should be no reason why, assuming equal facilities, a segregated school could not offer an education equal to that of an integrated school. Our men's and women's colleges somehow seem to offer an education equal, if not superior, to that of our co-educational institutions. Psychologically, it would seem equally plausible that any sense of inferiority would increase, rather than decrease, the motivation to learn. And how can the sense of inferiority confidently be isolated and attributed, for purposes of constitutional adjudication, to the factor of school segregation rather than to the whole life experience of the Negro child? The trouble is that under the quackery which passes as "progressive" educational theory the public school today is no longer considered to be merely a place to communicate facts and ideas and encourage thought; apparently this is no longer even deemed to be of any fundamental importance. Too often the public school today is more in the nature of a group therapy clinic where the emphasis on "life adjustment" has relegated traditional disciplines to relative insignificance. Under such a conception, obviously the fact of segregation assumes more relevance.

There is, of course, nothing wrong or even unusual in the use of scientific evidence in judicial proceedings.¹⁰ Patent cases often turn on engineering data, compensation cases and damage suits frequently depend on medical testimony, and anti-trust litigation could not proceed without opposing arrays of economic "experts." The danger in the use of such evidence when drawn from the social science is the real doubt which exists as to its reliability and credibility since, due to sub-

¹⁰Those who attack the Court's use of "sociology" would doubtless have welcomed a decision the other way based on such ground. Actually, the strongest argument which can be advanced in support of segregation is not a legal, but a sociological one, namely, that the great majority of the white group is in favor of continued segregation, and the great majority of the Negro group is not prepared for anything else.

ject matter and method of inquiry, the conclusions are not objectively ascertained or verifiable facts in the sense that is true in the physical sciences. Especially would this seem to be so of psychology and sociology. A consideration of the kind of evidence relied upon by the Court¹¹ persuades me that it is just about as inconclusive as the Court found the original intention of the framers of the Fourteenth Amendment to be. But even if the social scientists seems to be fairly well agreed as of now, to ground a decision on such evidence may be to build on shifting sands. Legal principles and judicial precedents, if not immutable, are at least within the Court's control. But what conclusions the psychologists and sociologists will be reaching next year, or five, or ten years from now, God only knows. Conceivably they may find that the sense of inferiority and the decreased motivation to learn are aggravated in integrated schools.

In discussing the effect of the segregation cases, the authors review the use of *Brown* as a precedent in subsequent cases dealing with transportation and recreational facilities, which support their conclusion that all racial classifications are now per se unconstitutional. The one major instance of racial classification not yet invalidated is the anti-miscegenation statute, and there would seem to be little room for doubt that, under present dispensation, such statutes will likewise be declared unconstitutional when the question comes before the Court. In discussing the patterns of compliance and methods of enforcement, the authors summarize the instances of desegregation since 1954; evaluate the "with all deliberate speed" formula and the confusion which has resulted in the attempts of various federal courts to apply this generality to dissimilar local condition; review the civil rights statutes which, theoretically at least, are available for use in the school segregation field; and give a brief rundown on the contempt powers of federal courts. The authors do not consider the possibility that the Court may in the future decide that the time interval for measuring "deliberate speed" commenced in May, 1954, with the result that in a future case the right may be declared, as to all possible plaintiffs, to be "present and personal." Nor do they consider the possibility of Congressional legislation under Section 5 implementing the decision.

The most dramatic effect of the segregation cases, however, has been in the degree of resistance engendered in the South, and in the various patterns of avoidance, evasion and delay. The authors group these in four categories.

(1) The revival of the pre-Civil War doctrines of interposition and nullification. The various resolutions of the state legislatures based on these doctrines have no legal effect, of course, as admitted by the Attorney-General of Virginia. Not even the brilliant high priest of state sovereignty, John C. Calhoun, ever went so far as to assert that a mere state legislature could nullify a national act; under his theory, this could be done only by a state convention representing the sovereignty of the people.¹² But even assuming that state judges could be found who would

¹¹See, e.g., Note, "Grade School Segregation: The Latest Attack on Racial Discrimination," 61 Yale L.J. 730 (1952).

¹²For a refutation of the theory underlying interposition and nullification, see 29 Miss. L. J. 110 (1957).

be willing to ignore the supremacy clause of the Constitution, there seems to be no way a state can close the United States District Courts. (2) Legislation designed to disqualify potential plaintiffs and the NAACP from bringing court actions to end segregation. These statutes are sufficiently diverse and the decisions too few to permit any confident generalizations at the present time. A recent decision in Virginia¹³ has invalidated such statutes. (3) Changing the theoretical basis of the separation from a racial classification to one based on other factors, such as health, aptitude, free choice, etc. This is the pupil assignment law, and the authors recognize what seems to be generally agreed, that such laws are constitutionally valid, if they are honestly and fairly enforced without regard to race or color. In short, these plans may be valid on their face and yet invalid as applied. If they are used in fact to attempt to perpetuate complete segregation, they will not succeed, as attested by recent decisions invalidating on their face pupil assignment laws in Virginia and Louisiana.¹⁴ Fairly enforced, however, the pupil assignment law is certainly the best legal way to minimize integration. (4) Various ways and means of seeking to separate the operation of the schools from the state. These plans commonly include the proposal to transfer the public schools to private institutions and to make tuition grants to individual students out of state funds. The difficulty with these plans, as the authors point out, is that the operation of such "private" schools would probably come within the concept of "state action" as attenuated in recent decisions.¹⁵ Short of a constitutional amendment or the Court's reversing the *Brown* decision, both of which are almost inconceivable as a practical matter, there seems to be no absolute and foolproof method open to the South of preventing integration except by completely abandoning its public school system and making no provision for any alternate system of education.

The authors abjure any discussion of the religious, moral, social or philosophical aspects of a segregation problem. As they state, "This is a book about the law, devoted to an explanation of how the courts have resolved, in legal terms, the issues of segregation." One can appreciate the limited ambition and the considerations of brevity and space behind this approach. But it is submitted that the essential meaning and effect of the segregation cases can only be evaluated if they are considered in the broader context of race relations as a problem of political and moral philosophy and practice. Thus, it is a fundamental ideal of democratic and Christian thought that every individual should have the opportunity for maximum development of his God-given abilities to the useful benefit both of himself and society. It has always been part of the American creed that a man's ability, honesty, integrity, and willingness to work are the qualities which should determine the limits of his success. By the middle of this century, an increasing number of Americans had come to believe that it was incompatible with these religious and democratic values for a man's status in society to be predetermined by the

¹³NAACP v. Patti, 26 U.S.L. Week 2370 (E.D.Va. Feb. 4, 1958).

¹⁴Adkins v. School Board of Newport News, 148 F. Supp. 430 (E.D. Va. 1957); Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir. 1957). Compare Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956).

¹⁵Terry v. Adams, 345 U.S. 461 (1953); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

fact that he was a Negro. On all fronts—political participation, economic opportunity, educational facilities—the Negro was advancing toward an equal status of citizenship, most dramatically in the South, where his disparity was the greatest. And this was being accomplished with the assistance and cooperation of the white people of the South, not alone because pressure made it expedient, but basically because of a feeling that it was right. When one considers the long range goals of elevating the Negro to first-class citizenship and preserving at the same time harmony between Americans of both races, it seems incredible that the matter of segregated schools should have been singled out and pushed to the front as an issue. For there were millions of white Americans who, by reason of conviction or custom, felt an emotional commitment on this question as they had not on any other. And as it happened, they were in political and economic control of the area where the greatest concentration of Negro population existed. The result has been that this one issue has taken over and dominated the entire field of race relations in the South which, by common agreement, have deteriorated to the most unhealthy condition in which they have ever been. Perhaps the Court was right in *Brown* when it stated that it could not turn the clock back. But it has certainly succeeded in slowing it down, it not stopping it altogether.

One cannot help wondering if it would not have been wiser for the Court to have insisted on a rigorous and strict compliance with the "separate but equal" doctrine. Far more desegregation could have been accomplished in the South under such an approach than is likely to take place in the foreseeable future under the *Brown* ruling. At least there would have been no plausible or respectable basis on which to oppose such desegregation, no possibility of justifying resistance by talk of "unconstitutional usurpation of power," "judicial amendment of the Constitution," "invasion of states rights" and the like. Today, of course, the white South is unwilling to permit desegregation even in situations where it would have been required under the "separate but equal" doctrine. As for those who take the position that the *Brown* ruling was inevitable, it should be sufficient to remind that if there is any single truth to be drawn from American constitutional history, it is that there is nothing inevitable about the interpretation of the Constitution's majestic generalities.

But, premising a decision not to adhere to the "separate but equal" doctrine, one cannot help wondering if it would not have been wiser for the Court to have based its result solely on legal principles and judicial precedents, extending the general rule against racial classifications to the new context of public education. There was, of course, no way to reach the result without overruling the *Plessy* doctrine, either expressly or by necessary implication. Under this disposition, the only argument open to critics of the decision would have been the departure from stare decisis. But this would have been no innovation. The Court has overruled earlier decisions dozens of times before. By grounding the result on a specious argument based on dubious sources, the Court served only to arm opponents of the decisions with another emotionally powerful argument, that the decision was not a legal, but a sociological, one.

But such musings are also exercises in futility. The deed has been done, the decision has been made. As the authors state, "Regardless of personal feelings about racial segregation and regardless of social attitudes toward the Supreme Court's approach and conclusion, *Brown v. Board of Education* must be acknowledged as an important, existing fact. . . . Whatever may be done in the future to advance or delay the course of desegregation must be accomplished within the legal framework of this decision. *Brown v. Board of Education* must stand as the most significant civil rights decision ever rendered by an American court and as the symbol of the social revolution which marks mid-twentieth-century America." (p. 267). The Court has recently reminded that from its decisions there is "no immediate appeal short of impeachment or constitutional amendment."¹⁶ This means that for all practical purposes the Court is the judge of its own power. Since this fact is a part of our constitutional system, it must be admitted that the Court had the power to command this social revolution. But time alone will convince, if anything will, that the commanding of social revolutions is a proper exercise of judicial power or that the manner in which this one was commanded was wise. In the long view these things may prove to be so, but in the short run and from this vantage point, it is hard to escape the conclusion that, when faced with this great challenge to judicial statesmanship, the Court did not measure up.

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University of Mississippi

¹⁶Rochin v. California, 342 U.S. 165 (1952) at 172.

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